

QUARTERLY REPORT of the ATTORNEY GENERAL of ALABAMA

**For the Period:
From July 1, 1938
Through September 30, 1938
VOL. XII**

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act of the Legislature of Alabama found on page 1114 of the General Acts of Alabama, Regular Session, 1935, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from July 1, 1938 through September 30, 1938.

The Act referred to above requires that six copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, and the County Superintendent of Education.

The Office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
A. A. CARMICHAEL,
Attorney General.

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OPINIONS

July 5, 1938

Dr. J. N. Baker,
State Health Officer,
Department of Public Health,
Montgomery, Alabama.

Health Department — Rabies Inspector — Public Officers —

1. Rabies Inspector held to be public officer within meaning of Section 280 of the Constitution.
2. Rabies Inspector not prohibited by Constitution from holding office of profit as Rabies Inspector, at time of holding employment as employee of Alcoholic Beverage Control Board.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of February 12, 1938, in which you request my opinion as follows:

"Acting under authority given in Section 2 of Act No. 200 (Page 230, General and Local Acts, Extra Session 1936-37) a certain county board of health has submitted to this office nomination for the position of rabies inspector. It is understood that the nominee is an employee of the Alcoholic Beverage Control Board.

"Please advise if this is in conflict with Section 280 of the Constitution. This office holds to the view that a rabies inspector is not an officer of the state within the meaning of the law."

In reply, I wish to refer you to the General Acts of 1936-37, page 230, Section 2, which provides as follows:

"Section 2. ENFORCEMENT PROVISION. For the purpose of providing proper enforcement of the provisions of this Act, each County Board of Health is hereby invested with general supervisory powers, and it shall be its duty, with the approval of the State Health Officer and the State Veterinarian, to designate or appoint, within 90 days of the passage and approval of this Act, a competent Veterinarian or other person properly qualified, who shall be known as the Rabies Inspector, and such Inspector may select as many deputies to aid him in such enforcement as he may desire. It shall be the duty of the said Inspector, under the direction of the County Board of Health, to enforce the provisions of this Act, and it shall be his duty to inoculate dogs or have the work done by his deputies when called upon to do so, and for the full enforcement of the provisions of this Act, the said Rabies Inspector, and his deputies are hereby clothed with full police power, and the sheriff and his deputies in each county and the police officers in each incorporated city are hereby designated as aids, and instructed to cooperate with said Inspector in carrying out the provisions of this Act. The compensation of the Inspector and his deputies shall be limited to the fees prescribed in succeeding sections of this Act. The said Rabies Inspector may be removed from office for cause by the County Board of Health."

In my judgment the Rabies Inspector, is a public officer, who holds an office of profit under the laws of Alabama, and within the meaning of Section 280 of the Constitution which prohibits the holding of two offices of profit under the laws of Alabama at one and the same time. You will note that the Rabies Inspector derives his authority directly from the State by legislative enactment, quoted supra, and the duties performed are of a public character. The terms of his compensation are definitely fixed by the terms of the above quoted law.

In my judgment, the Rabies Inspector falls squarely within the definition of a public officer as set out in the case of *Lacy Vs. State*, 68 So. 706, wherein the court referring to the holding of the Supreme Court of Alabama, said:

"Its holdings in this respect are that, where one derives his authority directly from the state by legislative enactment, and the duties imposed by the enactment are of a public character, and the terms and compensation are definitely fixed such person is an officer of the State."

You state that the Rabies Inspector here under consideration is an "employee" of the Alcoholic Beverage Control Board. This being true, there can be no conflict under the law, if the said Rabies Inspector holds such employment at the same time he holds the office of Rabies Inspector, there being no constitutional inhibition against the holding of non-conflicting employment and public office at one and the same time.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

License Tax Refunds — State Tax Commission has no authority to refund amounts paid for "near beer stamp tax," which were unused, unless application for refund was made within one year from date of payment.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 7, 1938, which is as follows:

"Mr. John Greco, of Birmingham, Alabama, has on hand Cereal Beverage Stamps amounting to \$107.76. Mr. Greco bought these stamps in good faith and paid the State for the same under the Cereal Beverage Act. Since the legalization of the sale of beer in Alabama, there is no sale for near beer and Mr. Greco has no use for the cereal beverage stamps.

"Please advise us if Mr. Greco's petition for refund of \$107.76, on surrender of stamps in the same amount to the State Tax Commission, can be approved and warrant of the State Comptroller issued to Mr. Greco, payable from the Cereal Beverage Fund."

I am of the opinion that your inquiry should be answered in the negative unless the application for refund was made within twelve months from date of payment of the tax and in the manner provided for in Act No. 432, S. 888, approved July 17, 1931, (General Acts 1931, p. 527).

The near beer stamp tax was paid under Act No. 89, H. 72, approved October 15, 1932, (General Acts 1932, p. 94). Said stamps were purchased in contemplation of placing them on the "near beer" that was received by the taxpayer for the purpose of distribution or sale or manufacture for sale. The tax did not attach until the near beer was received. If one purchased more stamps than were used, same could be attributed to a mistake of fact. Therefore, refund would be proper under Act No. 432, S. 888, approved July 8, 1931, (General Acts 1931, p. 527) *supra*, provided the conditions of said Act were fulfilled. One of the conditions is that the application for refund must be made within twelve months from date of payment. This condition has been held to be jurisdictional and cannot be waived. *Lee v. Cunningham*, 176 So. 475-477.

Neither Section 3144 of the Code of 1923, nor Section 366 of the Revenue Act of 1935, is applicable to the instant case.

"Near beer" as defined in the 1932 Act, *supra*, comes within the definition of "malt and brewed beverages" laid down in the Alabama Beverage Control Act, (General Acts 1936-1937, p. 42). So that for practical purposes, the latter Act supersedes the former Act in wet counties. However, the 1932 Act is in full force and effect in dry counties. — *Williams v. State*, 179 So. 915, cert. den. 179 So. 920. Therefore, near beer may still be legally sold in dry counties if same were available. However, inequitable as it may seem, it is my opinion that a refund may not be made unless the conditions and provisions of the 1931 Act, *supra*, have been met. There is no authority other than the 1931 Act, *supra*, which authorized such a refund.

I am herewith returning file in this matter.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Dallas County — County depositories may be required to make bond under Act 191, General Acts 1933, p. 203.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your request of May 16, 1938, which is as follows:

"Please refer to Local Acts 1876-7, page 172, Local Acts 1896-7, page 492, Local Acts 1898-9, page 42, Local Acts 1911, page 16, Sections 312-324, Code of 1923, Acts of 1933, page 203 and Acts of 1933, page 19 and advise me as follows:

"1. Should Dallas County require a bond or other security from such banks to secure the safety of County money on deposit with such banks?"

A review of the acts you cite shows the following:

Act 167, Acts 1876-7, p. 172 abolishes the office of County Treasurer of Dallas County and requires the tax collector and other designated officers of said county to deposit funds in the City National Bank of Selma and the Selma Savings Bank. No bond is required of either bank.

Act 196, Acts 1896-7, p. 492 consolidates all funds into the general fund of Dallas County.

Act 25, Acts 1898-9, p. 42 amends Act 196, supra, by providing for a quarterly publication of the financial statement of the county.

Act 34, Local Acts, 1911, p. 16, amends Act 167, supra, by designating additional banks as depositories. It also provides that the Board of Revenue may direct all settlements required to be made with the treasurer to be made with the County Board of Revenue. There is no bond required of any depository.

The powers of the Board of Revenue have been enlarged subsequently, but there is no local legislation requiring a bond of any of these depositories.

Sections 312-24, Code of Alabama, 1923, in my opinion, have no application to Dallas County, because there has been no treasurer of Dallas County since the Act of 1876-77; therefore, Section 312 (which was enacted into law in 1915) can have no effect. This act provides for the abolition of the office of county treasurer in all counties having a population of not more than 55,000 and creates in lieu thereof a county depository. The amendment of 1932 increases the population classification to 56,000.

Said Sections 312-24, are designated Article II of Chapter 17 and must be considered together. Under this theory, if a depository is required to make bond under Section 317, Supra, said depository must have been created by virtue of Section 312.

This is not true in the instant case, for the depositories, as stated above, were designated by local legislation.

Therefore, it is my opinion that the depositories of Dallas County are not required to make bond as provided in Section 317, supra.

From the above it is clear that the legislature intended public moneys on deposit in banks to be secured by sufficient bond.

It is my opinion, however, that a bond may be required of each of these depositories under Section 18 of Act 191, General Acts 1933, page 203 (Bains Act).

"That when in the judgment of the Court of County Commissioners, Board of Revenue or like governing body of any county it is considered necessary to the protection of the public interests, such governing body may require any county employee or any clerk, deputy or employee in any county office to give bond in such amount and with such surety as may be approved by said governing body, unless such bond is already provided for in this act."

Although our Supreme Court has held a bank of deposit in lieu of a county treasury is a contractee rather than a public officer (*Hasty vs. Marengo County Bank*, 206 Ala. 280, 89 So. 433), I am of the opinion that the above quoted section is broad enough to vest the county governing body with authority to require a bond of each of the depositories. Of course, the county governing body must first determine that such bond is "necessary to the protection of the public interest."

It is plain, from a reading of the entire Bains Act, that it was the intention of the Legislature to require a bond for the handling of county funds. Bonds for many officials are specifically provided and, in my opinion, Section 18 of the act was inserted to empower the county governing body to require a bond where not specifically provided by the act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. Howell Turner,
Secretary of State,
Capitol.

Election — Registration.

Examination and approval of forms to be supplied by the Secretary of State to the boards of registrars, pursuant to Section 386, Code of Alabama, 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I am in receipt of your letter of June 22, 1938, wherein you request my opinion as follows:

"You will find hereto attached suggested form of oath of applicant for registration, certificate of registration, notice to sheriff,

registration notice and sheets from books entitled 'Register of names stricken from lists' and 'Lists compiled by the Board of Registrars Names of Registered Voters.'

"Will you please advise if these forms conform to the requirements of the registration laws, including Section 186, Section 5 of the Constitution, and if not, your suggestions as to what they should include."

I have examined the forms attached to your inquiry and can advise you as follows: In reference to the suggested form of oath of applicant for registration, please be advised that the same specifically conforms to the provisions of Section 186, subsection 5 of the Constitution and to the provisions of Section 380, Code of Alabama, 1923. You will note that both of the above named provisions provide in part as follows:

"Each member of such board is authorized to administer the oath to be taken by the applicants and witnesses, which shall be in the following form, and subscribed by the person making it, and preserved by the board, namely: "I solemnly swear (or affirm) that in the matter of the application of _____ for registration as an elector, I will speak the truth, the whole truth and nothing but the truth so help me God'."

As to the remainder of the information necessary to be supplied by the applicant for registration and his supporting witnesses, it is my opinion this form is in substantial compliance with the provisions of our law contained in Section 188 of the Constitution; Section 381, Code of Alabama, 1923; Section 361, Code of Alabama, 1923; Section 363, Code of Alabama, 1923; Section 364, Code of Alabama, 1923; Section 365, Code of Alabama, 1923.

It is my opinion that the information which this form calls for the applicant to furnish is a substantial compliance with the law as the Supreme Court has held:

"That the exercise of the right of an elective franchise is a privilege rather than a right." **Gardina vs. Board of Registrars of Jefferson County**, 160 Ala. 155, 48 So. 788.

And further, discretion is vested in the Board of Registrars to refuse an applicant for registration. See Section 382, Code of Alabama, 1923.

The duty of the Secretary of State to furnish the necessary forms is found in Section 386, Code of Alabama, 1923, which reads in part as follows:

"Section 386. **REGISTRATION BOOKS, FORMS AND BLANKS FURNISHED BY SECRETARY OF STATE.** — The secretary of state shall, at the expense of the state, have prepared and furnished to the registrars and judges of probate in the several counties a sufficient number of registration books and blank forms of oath, certificates of registration, and of notices required to be given by registrars."

In reference to the certificate of registration, it is my opinion that the same is in substantial compliance with the provisions of Section 378, Code of Alabama, 1923.

With reference to the notice to be served by the sheriff, it is my opinion that this form is in substantial compliance with Section 393, Code of Alabama, 1923.

With reference to the blank form of registration notice, I am of the opinion that the same is in substantial compliance with Section 375, Code of Alabama, 1923.

I have examined the sheets from the books entitled "Register of Names stricken from lists," and "Lists compiled by the Board of Registrars of the names of registered voters." It is my opinion that these forms substantially comply with the provisions of Sections 396 and 401, respectively, Code of Alabama, 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. O. L. Andrews,
Clerk of the Circuit Court,
Jefferson County,
Birmingham, Alabama.

The Reconstruction Finance Corporation is a Federal Agency and, therefore, cannot be required to pay the \$3.00 trial tax which is imposed upon all cases, both law and equity, going upon the trial docket of the circuit court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 11, 1938, in which you request my opinion as follows:

"I am enclosing you correspondence with the Reconstruction Finance Corporation, in which they are holding up some bills of ours because they wish an opinion as to the payment of \$3.00 trial tax by the Reconstruction Finance Corporation."

It is my opinion your question should be answered in the negative. This office has held that National Banks are not subject to this tax in an opinion to Hon. J. H. Green, Clerk of the Circuit Court, Morgan County. — Quarterly Report of Attorney General, Vol. III, p. 213. The Reconstruction Finance Corporation is a corporation organized under an Act of Congress approved January 22, 1932, and recognized as a Federal Agency, and this being true, it would not be subject to this tax any more than a National Bank. — Biennial Report of Attorney General 1932-34, p. 460.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses — Schedule 146, General Revenue Act, 1935, as amended by Acts 1936-37, p. 277 — Transient vendors selling bottled drinks liable both for license for selling bottled drinks and license as transient vendor.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"We have an inquiry from a party in Tallassee, Alabama, as to what licenses he will be required to have in order to sell cold drinks, ice cream and candy from an automobile. This party informs us that he will not get out of the town but will move each day from corner to corner and make sales from his automobile.

"Kindly advise us whether or not he will be required to buy transient dealer license in addition to bottle drinks or if this is not required whether or not there will be any other license besides the one for bottle drinks."

Under the facts set out in your letter, the party in question comes squarely within the definition of a transient vendor as defined in Schedule 146, Section 348, General Revenue Acts, 1935, as amended by Acts of Special Session, 1936-37, page 277, Subsection (d) of this act provides:

"Definition of transient vendor or peddler — When used in this schedule, the words 'transient vendor or peddler' shall be held to include any person embraced in any of the following classifications: (d) All persons who do not keep a regular place of business open at all times, in regular business hours in the same place, going from person to person, house to house or place to place or from town to town and selling or offering for sale, other than to a retail merchant, goods, wares and merchandise which they carry with them and who deliver the same at the time or immediately after the sale."

Your next question is whether the payment of such transient dealer license is in addition to license for selling bottled drinks. In my opinion, this license is required in addition to that required by Schedule 146, Section 348, General Revenue Act of 1935. This Schedule 146 as amended provides:

"The payment of the privilege license required by this schedule shall not authorize any transient vendor or peddler to sell any goods, wares or merchandise for which a higher or specific license is required without the payment of such license in addition to the license herein levied." (Emphasis ours).

It has been considered by me that the license levied by this schedule is dependent on the manner in which the business is conducted. Quarterly Report, Vol. VII, page 168, Quarterly Report, Vol. II, page 310. The above quot-

ed section makes it clear that it was the legislative intent to impose not only the license for the sale of bottled drinks but the transient vendors license for the manner of selling as described in your letter.

In addition thereto, Section 357 of the Revenue Act of 1935 expressly provides:

"Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

It is, therefore, my opinion that the party in question is liable for both these licenses.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. J. A. Coleman,
Superintendent of Education,
Lowndes County,
Hayneville, Alabama.

Lowndes County — Vacancy in the office of County Superintendent of Education is filled under provisions of Section 148, School Code of Alabama, 1927.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of June 10, 1938, which is as follows:

"I desire your opinion on the following question:

"In event of the death or the resignation of the County Superintendent of Lowndes County, Alabama, who has the authority to appoint a successor to fill the vacancy?

"You will find in the Acts of the Legislature of 1915, p. 281, the law which took the election of County Superintendent from the people, and directed that the people elect a County Board of Education, and invested this Board with the authority to select a County Superintendent of Education. See Section 6, subdivision 1, of said act. Also subdivision 13 of said Section 6, authorizing the Board of Education to dismiss any Superintendent of Education.

"I take it, that under this Act, the combined powers to select and dismiss given to the Board of Education, would also give the Board the right to fill any vacancy occurring in the office of Superintendent.

"I now call your attention to a Local Act, applicable to Lowndes County. This Act: No. 145 (Brooks) is found on page 41 of the Local

Acts of 1931. Under Section 1, of this act a special (referendum) election was held in Lowndes County, at the proper time, and the people of the county, voted a substantial majority to make the office of Superintendent of Education, elective, thereby abrogating the power of the Board of Education to select a Superintendent. There is nothing in the 1931 Act which provides for the filling of a vacancy in the office, so it seems that it might be right and proper in such case, to look to the authority for appointment given in Section 2584 of the Code of 1923. However, I am asking for your opinion, and shall thank you to give this question consideration and report to me, as early as you can conveniently do so."

As Act No. 145, Local Acts 1931, page 41, makes no provision for the filling of a vacancy in the office of County Superintendent of Education of Lowndes County, I am of the opinion that Section 148, School Code of Alabama, 1927, is applicable. Said section provides as follows:

"148. VACANCY IN OFFICE OF COUNTY SUPERINTENDENT. — A vacancy in the office of County Superintendent shall be filled by the County Board of Education within thirty days after such vacancy occurs. In the event such vacancy is not filled by the County Board of Education within thirty days, the State Superintendent of Education shall fill such vacancy by appointment. The appointee shall hold office for the unexpired term. Term, as used in this Section, includes in addition to those terms the beginning and ending of which are fixed definitely by the law, terms fixed by the County Board of Education, in which latter case the unexpired term shall be the balance of the term fixed for the last person serving as such officer; provided that when there is such vacancy which the State Superintendent is authorized to fill, and no term has been fixed by the County Board of Education, and no term of definite duration is fixed by law, the appointee of the State Superintendent of Education shall serve two years from the next succeeding first of July."

For a discussion of this section and of the question of filling such a vacancy in general, I refer you to an opinion of this office to Hon. A. H. Collins, State Superintendent of Education, under date of March 21, 1938, which is found at page 152 of the Quarterly Reports of the Attorney General, Vol. X.

In my opinion, Section 2584, Code of Alabama, 1923, to which you refer, is not applicable in the instant case.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.
Taxation —

Where a person on October 1st, has in the process of completion three houses and the material for the completion of the houses is on

the ground, both the incomplete houses and the material, for the purpose of taxation, are to be assessed at sixty per cent of its fair and reasonable market value as of October 1st, in the tax year.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter wherein you request my opinion as follows:

"Mr. Jones is building several houses and on Oct. 1, one is almost complete except painting, one has only the foundation and frame work, another only the foundation; but material for completion of these houses is on the ground.

"On the house that is almost complete, we assess it at 90% of its fair and reasonable market value as of Oct. 1, and the other houses the same way.

"Do we further assess the material on the ground at its cost price less 40% or at 60% of its cost value."

In reference to your inquiry Section 6 of Article 1, General Acts of 1935 page 263 provides:

"That all taxable property within this State shall be assessed for the purpose of tax at sixty per cent of its **fair and reasonable market value.**" (Italics ours).

I assume therefore that where you state that you assess the house that is almost complete you mean sixty per cent not ninety per cent.

In reference to the material on the ground for the completion of the other two houses; without considering to whom this assessment is to be made, this material would come under the provisions of Section 10, General Acts of 1935, page 267:

"(o) All other property real, personal or mixed not hereinbefore specified of whatever class, whether ejusdem generis or not, except herein specifically exempted, which said property shall be assessed and specifically described."

These materials are therefore to be assessed as personal property since they are not so annexed or attached to the land as to pass by a conveyance. Pursuant to Section 6 supra, these materials must be assessed at sixty per cent of its **fair and reasonable market value.** Cost value or cost price does not control but is merely one of the factors to be considered in finding what is the fair and reasonable market value as Section 38, General Acts of 1935, page 278 provides in part as follows.

"Section 38. For the purpose of assessment, real and personal property shall be estimated at its fair and reasonable market value, according to the best judgment of the assessor, the Board of Review and Agents of the State Tax Commission can form upon information, inspection or otherwise, taking into consideration all elements or factors bearing on such value as heretofore authorized."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Interstate commerce — Where goods are purchased in one state for transportation to another, the purchase is interstate commerce quite as much as the transportation, provided there are circumstances demonstrating with certainty the destination of the goods. Such interstate commerce sales are not subject to Sales Tax Act approved February 23, 1937, (General Acts 1936-1937, p. 125) as such are within the exemption of subsection (f) of Section 2 thereof.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 27, 1938, which is as follows:

"In the administration of the Alabama Luxury Tax Act (House Bill 179, approved February 23, 1937) there are numerous questions which have arisen with regard to the application of the tax to certain sales involving the element of interstate commerce. The Act itself (sub-section (f), Section 2) specifically provides that: 'There shall be excepted from the gross receipts of sale so as not to be taxed so much thereof as is derived from business conducted in commerce between this State and other States of the United States, or between this State and foreign countries, which the State of Alabama is prohibited from taxing under the Constitution of the United States of America'. In view of this provision of the Act, the Commission has not contended that the tax applies to any sale which is actually a sale made in interstate commerce. The question has arisen, however, as to whether or not certain sales are made in interstate commerce to such an extent that they are not subject to the tax in question.

"We will endeavor to state the various questions which are now before the Commission, as follows:

"(1) A contractor who maintains his principal place of business within the State of Alabama, places an order with an Alabama dealer in building materials and by the terms of his order requires the dealer, who is located within the State, to make delivery of the materials at a place where they are to be used in some other State than Alabama. In this case, both the buyer and the seller are located in the State at the time the order is placed and the order is placed within the State and filled from stocks of goods located within the State and the purchase price is paid by the buyer within the State. The goods, however, are shipped in interstate commerce and delivered by the seller to the purchaser or his agent at a point outside of the State of Alabama. Is the seller required to collect the 2% tax upon such transactions? In making this inquiry, we ask you to bear in mind that the Act specifically provides that all sales of building materials to contractors for use or resale as real estate are retail sales.

"(2) A seller located within this State sells tangible personal property at retail to a railroad company operating in this State. The sale is f. o. b. the cars of the railroad company on its tracks at a point.

within the State of Alabama for transportation and delivery to some point designated by the purchaser in another State, all of which is part of the original contract.

"In another case, the seller, located within this State, contracts with the purchaser to sell material at retail f. o. b. railroad cars at a point in this State but, under the provisions of the contract, the purchaser pays the freight to point of destination. The seller is obligated to ship and consign the material to a destination outside of the State of Alabama.

"You will note that in one instance the purchaser is the common carrier, while in the second instance the purchaser is not a common carrier but in both cases the goods are sold f. o. b. the cars in Alabama.

"There is no contention on the part of this Commission that the shipment is not in interstate commerce but the question arises as to whether or not the sale itself is a sale in interstate commerce so as to prevent the State from requiring the seller to collect the 2% tax required by House Bill 179."

I am of the opinion that each of the three situations presented in your inquiry is an interstate commerce sale and is not subject to the Sales Tax Act approved February 23, 1937, (General Acts 1936-37, p. 125) as being within the exemption of subsection (f) of Section 2 thereof.

In dealing with the general proposition of "Purchase for Transportation out of State," 11 American Jurisprudence, 41, states as follows:

"Section 42. — Purchase for Transportation out of State. — Purchases of goods within a state may form part of transactions in interstate commerce, for if transportation is incidental to a sale, it is immaterial which comes first. Thus, where goods are purchased in one state for transportation to another, the purchase is interstate commerce quite as much as the transportation, provided, it seems, there are circumstances demonstrating with certainty the destination of the goods. Thus, the buying of grain within a state for shipment to markets in other states constitutes interstate commerce if followed by shipments into other states. * * * "

In support of the above rule the following authorities are cited: *Eastern Air Transport v. South Carolina Tax Commission*, 285 U. S. 147, 76 L. ed. 673, 52 S. Ct. 340; *Dahnke-Walker Mill Co. v. Bondurant*, 257 U. S. 282, 66 L. ed. 239, 42 S. Ct. 106; *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66, 67 L. ed. 865, 43 S. Ct. 485; *Farmers' Grain Co. v. Langer*, (C. C. A. 8th) 273 F. 635, 19 A. L. R. 148, affirmed in *Lemke v. Farmers Grain Co.* 258 U. S. 50, 66 L. ed. 458, 42 S. Ct. 244; *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 74 L. ed. 504, 50 S. Ct. 169; *Shafer v. Farmers Grain Co.* 268 U. S. 189, 69 L. ed. 909, 45 S. Ct. 481; *Lemke v. Homer Farmers' Elevator Co.* 258 U. S. 65, 66 L. ed. 467, 42 S. Ct. 250.

The case of *Dahnke-Walker Milling Co. v. Bondurant*, supra, involved the situation where the purchaser, a foreign corporation, took delivery of goods within the State but on board cars of a public carrier, intending to forward it to an out-of-state destination. The Supreme Court of the United States held the transaction was interstate commerce. There, the Court said:

"Such (interstate) commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. * * * **On the same principle where goods are purchased in one State for transportation to another, the commerce includes the purchase quite as much as it does the transportation** (citing authorities). This has been recognized in many decisions construing the commerce clause * * * . **Buying and selling** and the transportation incident thereto constitute commerce. * * * Interstate commerce consists of intercourse and traffic between citizens or inhabitants of different states, and includes not only the transportation of persons and property, and the navigation of public waters for that purpose, **but also the purchase, sale and exchange of commodities.** In no case, has the Court made any distinction between buying and selling, or between buying for transportation to another State, and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

"Applying to these facts the principles before stated, we think the transaction was in interstate commerce. The State Court stressing the fact that the contract was made in Kentucky, and was to be performed there, put aside the further fact that the delivery was to be on board the cars, and that the purchaser in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what had otherwise seemed an intrastate transaction, was part of interstate commerce." (Citing authorities).

In the case of **Pennsylvania R. R. Co. v. Clark Coal Co.**, 238 U. S. 456, 59 L. ed. 1406, the United States Supreme Court further stated:

"In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative."

And in the case of **Western Oil Co. v. Lipscomb**, 244 U. S. 346, 61 L. Ed. 1181, the Court held a shipment to be interstate commerce and not taxable under facts there which they said was "a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated, and where there is nothing which requires that decisive effect be given to the bill of lading," and further, that "It is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive." See also **B & O v. Settle**, 260 U. S. 166, 67 L. Ed. 189.

In the most recent case of **Santa Cruz Fruit Co. v. National Labor Relations Board**, 82 L. Ed. 653, the United States Supreme Court adheres to the above principles. There the Court said:

"There is no question that petitioner was directly and largely engaged in interstate and foreign commerce. We have often decided that sales to purchasers in another State are not withdrawn from federal control because the goods are delivered f. o. b. at stated points within the State of origin for transportation. See **Savage v. Jones**, 225 U. S. 501, 520; **Texas and N. O. R. R. Co. v. Sabine Tram Co.**, 227

U. S. 111, 114, 122; *Pennsylvania R. R. Co. v. Clark Coal Mining Co.*, 238 U. S. 456, 465-468. A large part of the interstate commerce of the country is conducted upon that basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, where the actual movement is interstate, does not affect either the power of Congress or the jurisdiction of the agencies which Congress has established. *Pennsylvania R. R. Co. v. Clark Coal Mining Co.*, supra.

" * * * It is upon this well-established principle that the constitutional validity of the National Labor Relations Act has been sustained. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 38.

" * * * And the place where the manufacturer makes his sales is not controlling if the sales in fact are in interstate commerce."

The case of *Superior Oil Co. v. Mississippi*, supra, which holds a certain transaction not to be interstate commerce was based on the facts of the particular case and does not affect the above principles. In that case, there was involved an attempt to evade the tax through the process of a contract of sale, which the Court said "had no other use than * * * to try to convert a domestic transaction into one of interstate commerce." Further, that "the only purpose of the vendor here was to escape taxation." In other words, there, the business was local to Mississippi, and aside from the fact that the goods were delivered to the so-called consignee within the State, and were in its hands throughout, there was no consignee at the point of destination in Louisiana, and there was no point of destination for delivery of the oil therein, merely a neighborhood in which the backers that had bought it and already held it expected to sell it again, and the Court there very properly held that it was "not within the power of the parties by the form of their contract to convert what was conclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause." The court said further "A distinction has been taken between sales made with a view to a certain result and those made simply with a different knowledge that the buyer contemplates that result."

From the foregoing, it appears that the question of whether or not a transaction is interstate commerce is now dependent on the legitimate and authentic transportation feature, the place of the consummation of the sale and the billing of the goods being immaterial. In other words, if there is a legitimate and authentic transportation of goods from one state to another, the transaction is considered interstate commerce regardless of the mode of billing or the place of the consummation of the sale.

The premises considered, it is my opinion that each of the situations presented in your inquiry constitutes interstate commerce transactions. In each case there is a legitimate and authentic transportation from the State of Alabama to another State. In my opinion, the fact that the sale was consummated in this state by residents of this state is immaterial in one situation. It is my opinion that in the other situations the fact the sale is f. o. b. cars in Alabama is of no consequence. Therefore, since the sales in question are interstate commerce transactions, such come within the exemption of subsection (f) of Section 2 of the Sales Tax Act approved February 23, 1937, (General Acts 1936-1937, p. 125), and no sales tax is collectible.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Licenses — Chain Stores —

Person opening a chain of stores must secure a license for each store and where one of the stores is closed in one county, and another store opened in another county, the license of the closed store is not transferable to the new store, but an additional license must be secured.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter wherein you request my opinion as follows:

"Will you please furnish this department with your formal opinion in regard to the following questions:

"In December, 1937, a chain store operator filed application with this Commission for 1938 licenses to operate a chain of eighteen stores, which constituted the complete chain as of January 1, 1938. The licenses for these eighteen stores were duly issued. On January 20, 1938, one of these stores which was located in Jefferson County was closed. On February 28, 1938, another one of these stores which was operated in Jefferson County was closed. On March 1, 1938, a new store was opened by this operator in Jasper, Ala., and on March 7, 1938, another new store was opened by this operator in Sylacauga, Alabama.

"Under the facts stated above, it is requested that you advise whether or not this Commission would have the right to transfer to the new stores located at Jasper and Sylacauga, respectively, the licenses which were originally issued for the two stores which were closed in Jefferson County, Alabama.

"It is also requested that you advise whether or not in your opinion any license issued under the provisions of the Alabama Chain Store Tax Act may be transferred either to a new store operated by the same person for which the original license was issued or may be transferred to a new owner of the original store for which the license was issued.

"If, in your opinion, the licenses described in the first part of this inquiry may be transferred, please advise what charges should be made for such transfer.

"If it is held that the licenses originally issued for the operation of the two stores in Jefferson County cannot be transferred to the new stores operated in Jasper and Sylacauga, respectively, then will you please advise whether or not the new licenses required to be issued to the new stores located in Jasper and Sylacauga should be issued under Schedule 155.4d or under Schedule 155.4e of the 1935 Revenue Act.

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"In other words, if this operator is required to obtain any licenses for the two new stores, shall these licenses be issued on the same schedule of payments as the licenses were issued for the original eighteen stores or shall they be issued as if the two new stores were in addition to the original eighteen stores, bearing in mind that between the time for an issuance of the old license and the application for the new, two stores have been closed, thus leaving the chain with the same number of stores as when the original application was filed."

In my opinion the license described in your inquiry cannot be transferred to the new stores. The licensing provisions are contained in Article 12, Revenue Act of 1935. Schedule 155.1 thereof (Simon's Code, p. 300) provides in part as follows:

"The applicant desiring to operate, maintain, **open** or establish such stores, shall make a separate application for a license to operate, maintain, open or establish each store, but the respective stores for which the applicant desires to secure license may all be listed on one application blank." (*Italics ours*).

You will note that the licensing provision applies on either one of four incidents, namely: "to operate, maintain, open or establish each store." It is my interpretation of this section that the license is due when the store is opened and the mere fact that the store subsequently closes or is closed, has no effect.

The only provision for a transfer of a license is found in Section 358 (1935 Revenue Law, Gen. Acts 1935, p. 561) but this contemplates an actual sale of the business to a new ownership. It is fundamental that unless a transfer is permitted by the licensing statute, a license cannot be assigned or transferred. 37 C. J. P. 245. There is nothing in our law which permits a transfer of this license. If, as stated by you in your inquiry, one of the stores is sold to a new owner, the license may then be transferred under the provisions of Section 358 subsection (b) *supra*. See also Quarterly Report of Attorney General, Vol. I, p. 358.

In reply to the second portion of your inquiry, it is my opinion that the new licenses required to be issued for the new stores located in Jasper and Sylacauga should be issued under the provisions of Schedule 155.4(d), since together with the new stores the whole chain of stores is not in excess of twenty stores.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

Hon. O. L. Bethune,
Tax Assessor,
DeKalb County,
Fort Payne, Alabama.

July 5, 1938

1. Motor vehicles, assessment for taxes — Assessment for ad valorem taxes on motor vehicles must be made pursuant to Schedule 158.12 of the Revenue Act of 1935 at or before the time of applying for license tag thereon.

2. Motor vehicles not subject to assessment as part of stock of goods of automobile dealer but subject to separate assessment.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of December 1, 1937, in which you request my opinion as follows:

"In reference to yours of the 24th inst., I will give you more facts as to my inquiry of the 15th.

"The Rains Chevrolet Company claims that they should not pay ad valorem tax on the motor vehicles which they had in stock on October 1st. at the time they buy tags for these motor vehicles. They claim that they carry these motor vehicles in their assessment of the corporation. These are motor vehicles that were owned and operated in this state last year.

"In volume 7 page 245 of the Attorney General's rulings where is stated the following:

'Every person, firm or corporation who desires to operate a motor vehicle on the public highways of Alabama, shall first return such motor vehicle for ad valorem taxes to the tax assessor of the county in which he resides, for the preceding year and the tax assessor of this county shall deliver to such person who makes the return as herein required a certificate of assessment on form provided by the State Tax Commission, and such certificate shall be the warrant of the tax collector to collect the tax as shown thereon.'

"I understand the above to mean that the ad valorem tax must be paid before the tag is issued to anyone whether it be a firm, corporation, or individual.

"Please give me a ruling on this at once so that I may satisfy all that are concerned."

As I understand your letter, the Rains Chevrolet Company claims that the motor vehicles which they had in stock on October 1st have been included in their assessment of ad valorem taxes. They, therefore, deny their liability for assessment and payment of such ad valorem taxes at the time of applying for a license tag thereon.

In my opinion, such company must make return and pay taxes at or before the time of applying for license tag. Such is the direct and clear language of Schedule 158.12 of the Revenue Law of 1935, which provides as follows:

"(a) To prevent motor vehicles within the meaning of this Act from escaping taxation and to provide for the more efficient assessment and collection of taxes due on same, no license shall be issued to operate a motor vehicle on the public highways of this state nor shall any transfer be made by the probate judge as provided under this Act, until the ad valorem tax on such vehicle shall have been paid in the county for the preceding year, as evidenced by a receipt of the tax collector where the owner of said vehicle resides, if the

vehicle is owned by an individual, and if the vehicle is owned by a firm, corporation or association, then as evidenced by the receipt of the tax collector in the county in which said motor vehicle is used or operated. Every person, firm or corporation, who desires to operate a motor vehicle on the public highways of Alabama shall first return such motor vehicle for ad valorem taxation to the tax assessor of the county in which he resides, for the preceding tax year, and the tax assessor of such county shall deliver to such person who makes the return as herein required, a certificate of assessment on a form provided by the State Tax Commission, and such certificate shall be the warrant of the tax collector to collect the tax as shown thereon."

It seems from your letter that the company in question claims that they have included these motor vehicles in their assessment for ad valorem taxes. If such was done, in my opinion, it was erroneously done. While it is true that Section 10-D of the Revenue Law requires the payment of an ad valorem tax on all stocks of goods, wares and merchandise, and Section 31 requires the tax assessor to make an assessment against each person of all property owned by them, in my opinion, this general requirement is subject to the specific provisions as to the assessment of motor vehicle taxes. As early as 1923, this direct question was decided by this office in the opinion in the Biennial Reports of the Attorney General for 1922-24, page 225. It was there stated:

"I will say that, in my opinion, the Act relating to licenses and taxes on automobiles, approved September 25, 1923, places automobiles for taxation in a class by themselves. Section 19 of this Act provides that every automobile owner shall show that he has paid the tax on his automobile for the past year when he applies for a license. To construe this law so as to make the dealer pay an ad valorem tax on automobiles as a part of his stock in trade, and then make the purchaser pay a tax on the same automobile for the same year, would exceed the constitutional limit as to state and county taxes on such automobiles. In other words, the present law, in my opinion, requires that the tax be paid upon each separate automobile, and, therefore, it is my opinion that automobiles should not be considered as part of merchandise of a dealer for purpose of taxation."

Section 20 (c) of this 1923 Act there referred to expressly provided that after the first day of October, 1923, motor vehicles should not be included in any assessment made by any person, firm or corporation as of the first day of October, 1923, or subsequent years. This section was followed by Section 18(c) of the Acts of 1927, page 139, which appears as subsection (c) of Schedule 13 of Section 334 of the 1929 Compilation of the Revenue Laws at page 215. In view of this subsection (c) it was held in the opinion in Biennial Reports, 1930-32, page 454, that there was no provision for the assessment of motor vehicles in the way property is ordinarily assessed and that motor vehicles are not assessable until application for tag license is made.

Schedule 158.12 above quoted follows subsection A of this same Section 18 of the Act of 1927. While it is true that subsection C, above referred to, was omitted from the Revenue Law, in my opinion, this omission does not affect the conclusion hereinbefore reached, but such omission is explainable as the necessity therefore had long since ceased. Since 1923, no assessment

of motor vehicles was made with the ordinary assessment for ad valorem taxes, but such assessments were made on separate blanks made and prepared by the State Tax Commission. Section 27 of the Revenue Act of 1935, requires the State Tax Commission to prepare forms for assessment for ad valorem taxes. Such forms so prepared pursuant to this section contain no blank for the assessment of motor vehicles, but to the contrary, expressly exclude motor vehicles (tax return list, question 19.) As is specifically required by schedule 158.12, the State Tax Commission prepares a special form for the assessment of motor vehicles for ad valorem taxes. If anything were necessary to strengthen the conclusion of the opinions above cited, this long standing administrative construction clearly shows that such motor vehicles are not assessable for taxation as are other articles of personal property or stock of goods, wares, and merchandise, but are assessable in the manner and at the time required by Section 158.12.

It is, therefore, my opinion that the party inquired about must assess said motor vehicles for taxation and pay the tax thereon at or before the time of applying for license tags thereon. Any assessment of such motor vehicles for ad valorem taxes as part of the stock of goods, wares and merchandise is erroneous.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Dr. A. H. Collins, Superintendent,
State Board of Education,
Capitol.

County Board of Education — A contract by a County Board of Education with a taxpayer for the payment of a stated sum of money in lieu of assessing taxes is invalid and the Board has no power to remit any portion of school taxes subsequently legally levied and collected.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"On the 11th day of May, 1928, the Sumter County Board of Education entered into a contract with the Allison Lumber Company of Bellamy, Alabama, by which contract the Allison Lumber Company agreed to pay the County Board of Education \$750 per year in lieu of certain taxes on said company's property for ten years. A copy of that contract is attached to this letter.

"The contract further provided that the Sumter County Board of Education would not call for a tax election on said property during the term of said contract. However, the County Board of Education did call an election one year before said contract expired and it developed that inasmuch as the County Board of Revenue had assessed this property just as other property of the county. Said Allison

Lumber Company on the basis of this assessment paid \$705 more in taxes than the amount set out in the above mentioned contract. In the light of this situation the Sumter County Board of Education wishes to have your opinion as to whether the County Board of Education may refund the \$705 to the Allison Lumber Company.

"On November 15, 1933, the office of the Attorney General held in an opinion to A. F. Harman, State Superintendent of Education, that the attached contract was valid. The situation seems to be as follows:

"The Sumter County Board of Education believes that under the previously referred to contract, it has a moral obligation to refund \$705 to the Allison Lumber Company. The County Board of Education desires to know whether or not it can legally do so."

This contract in question is for the payment of a sum of money in lieu of levying and assessing a tax. It will be necessary before answering your main inquiry to pass on the validity of this contract. A County Board of Education is a creature of statute and only has such powers as are specifically granted to it, *Woodruff v. Beeland*, 220 Ala. 652. The taxing power of the County Board of Education is statutory and must be exercised within the terms of the legislative grant. The Supreme Court of Alabama has held that taxation insofar as it is not restrained by the Constitution is a legislative power. It is generally held that duties in reference to taxes which are ministerial in their nature may be delegated by the legislature to a subdivision of the State but the right to grant exemptions to taxpayers cannot be delegated. 61 C. J. Section 11, page 84. The pertinent provisions of the Constitution with reference to the power of the legislature to levy taxes is Section 217 which provides as follows:

"Section 217. The property of private corporations, associations, and individuals of this state shall forever be **taxed at the same rate**; provided, this section shall not apply to institutions devoted exclusively to religious, educational, or charitable purposes." (*Italics ours*).

It is important to note further that Sections 3022-3028, Code of Alabama, 1923, specifically set forth what property shall be exempt from taxation. Although the question here presented has not been passed upon by our courts, the great weight of authority found in the courts of other states holds that such a contract is invalid. See *Inhabitants of the town of Milo v. Milo Company*, 163 Atlantic 163; *Inhabitants of the town of Southborough v. Boston and Worchester Street Railway Company*, 145 N. E. 422; *Louisiana Cotton Mfg. Co. v. City of New Orleans*, 31 La. Annual Reports 440; *Scobey v. Decatur County*, 72 Ind. 551; *Tarver v. Mayor and Council of Dalton*, 134 Ga. 462. In the last cited case the court held at page 468,

"It is as unlawful to sell an exemption as it is to give it away. Municipal authorities can no more bestow on an owner of property subject to taxation an exemption therefrom for a consideration than they can bestow it gratuitously.

"A contract, however, which purports to bind the city to collect no taxes from the owner of property, in return for a valuable consideration, is clearly a sale of an exemption of such property by way of commutation of the tax, and is illegal under the provisions of the Constitution above referred to. The fact that the city, under a con-

tract of this nature, may have received from the tax debtor benefits which in value equal or exceed the amount of the tax due can not deter the city from enforcing the collection of such tax, and any contract of this character purporting to bind the city so as to prevent the collection of its tax revenue is unlawful. * * * * " (Italics ours).

The above principle has been affirmed on many occasions. In Cooley on Taxation at Section 18, Judge Cooley makes the following statement:

"Commutation of taxes has been defined as 'a payment of a designated sum for the privilege of exemption, or the selection, in advance, of a specific sum in lieu of an ad valorem tax' 'Commutation of taxes is sometimes forbidden by the State Constitution. A denial of the power to exempt from taxation includes a prohibition against the power to commute taxes, since the right to commute is simply an incident of the power to exempt."

The fact that in the instant case the Board of Education did not call an election until one year prior to the expiration of the contract involved is not controlling in that there can be no estoppel asserted against the exercise of the taxing power by either the State or a subdivision of the State. As was said by the court in the case of *Inhabitants of the town of Milo v. Milo Company*, supra.

"So, whether action of assessors of Milo in former years be viewed as abatement or exemption, the assessors of Milo for 1928 were not precluded from assessing the tax in question. As we understand the constitutional and statutory provisions specifying the duties of assessors of taxes in like cases, it was their duty to tax the company
* * *

"We are constrained to hold that the complaint shows the lands to be subject to taxation, and that there can be no estoppel in pais asserted against the exercise by the state of the taxing power of the state. * * * In full realization of the fact that few cases can be found bearing squarely on the point, we are nevertheless of the opinion that an equitable estoppel does not lie against a town in the exercise of its taxing power, which necessarily included the power of collecting taxes lawfully assessed. To hold otherwise would, we believe, be contrary to sound public policy and destructive of a fundamental sovereign right."

In this case a contract similar to the one under consideration was entered into in 1909 and no tax was ever assessed against a *Water Company* until 1928 when a tax was assessed and an action brought to collect the tax. The court held in this case that even though the town had voted to exempt the company from taxation that this was beyond the power of the town.

Although a state may have the power to grant exemptions from taxation this power cannot be delegated. The Supreme Court of Alabama has held that a school district is an instrumentality of the State and a tax levied and assessed by a school district is a State and County tax. *City of Birmingham v. Hawkins*, 208 Ala. 79. The contract involved here relates to the subject of taxation which in essence is and must be authorized by a general law. It is my opinion that the contract between the Allison Lumber Company and the Sumter Board of Education was invalid and not enforceable as against the Board of Education. The opinion of this office of November 15, 1933 to Hon.

A. F. Harman, in so far as the same conflicts herewith, is expressly overruled and withdrawn.

It is further my opinion that the Sumter County Board of Education cannot as a result thereof refund the \$705 to the Allison Lumber Company. Based on the above authorities, it is my opinion that at no time during the life of this contract could the Allison Lumber Company have prevented and enjoined the Board of Education from calling the special tax election under Article 13 of the School Code of 1927. It is now settled law that an equitable set-off does not lie against the taxing authority in the exercise of its taxing powers which necessarily induces the power of collecting taxes lawfully assessed. 61 C. J. 136. As is stated above the school district tax is considered to be a state and county tax and it appears from your inquiry that the same was regularly levied and collected. Section 100 of the Constitution provides:

"Section 100. No obligation or liability of any person, association, or corporation held or owned by this State, or any county or other municipality thereof, shall ever be remitted, released, or postponed, or in any way diminished, by the legislature; nor shall such liability or obligation be extinguished except by payment thereof; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; provided, that this section shall not prevent the legislature from providing by general law for the compromise of doubtful claims."

It is my opinion that the tax, being legally assessed, has become a debt due the State or in the hands of the State and the Constitutional provision above quoted stands as a barrier preventing the County Board of Education of Sumter County from remitting or refunding to the taxpayer any portion of the tax legally assessed and collected.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. A. L. Hasty,
Judge of Probate,
Marengo County,
Linden, Alabama.

Veterans — Peddler's License —

1. Exemption allowed qualified veterans from license in each county in which he does business, provided total amount of all county licenses issued do not exceed \$25.00

2. Itinerant vendor or peddler required to pay state license in each county where he does business under Schedule 146, as amended, of the Revenue Laws of 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 4, 1938, in which you request my opinion as follows:

"Please advise me whether a War Veteran who is exempt from payment of a Peddler's license can get exemptions in more than one County; that is, this veteran has exemptions or license for Dallas County and he is doing business in Marengo County and other Counties and thinks he should be exempt in each county. This license comes under Schedule No. 230 (H. 180) Section B. Also let me know if a State license should be issued for every County in which the business is conducted under said Schedule?"

Under Section (b) of an Act approved March 2, 1937, (Gen. Acts 1936-37, p. 277) which act amends Schedule 146 of the General Revenue Laws of 1935, it is provided that:

"(b) Each itinerant vendor or peddler of merchandise, other than tobacco products, medicines or household remedies, who operate on foot or use a vehicle solely for the purpose of transporting merchandise from house to house or place to place but who do not use such vehicle for the display of merchandise or as a rolling store and who do not permit purchasers to enter said vehicle for the purpose of purchasing merchandise, shall pay an annual license of Twenty Dollars (\$20.00) to the State and Ten Dollars (\$10.00) to the county in each county in which they do business."

You will note that this section provides that there shall be a license of \$10.00 paid by each itinerant vendor or peddler of merchandise in each county in which they do business.

By Section 3 of an Act approved September 13, 1935, (Gen. Acts 1935, p. 1057) there is granted the following exemption to disabled veterans of the wars mentioned therein who are properly qualified under the act:

"Section 3. That each such person who shall engage in, or carry on, any business or occupation as a means of livelihood through the personal efforts of such person or through the personal efforts of such person and not more than one employee, helper or apprentice, for which business or occupation a license tax is prescribed by or for any County of Alabama, shall be entitled to a license from such county to so engage in, or carry on, such business or occupation upon payment of the license tax so prescribed, less all, or such portion of, such license tax as shall not exceed Twenty five Dollars (\$25.00); provided, however, that no such person shall be entitled to the prescribed deduction or commutation in respect of more than one business or occupation for which a license tax is prescribed by law."

Section 11 of the aforementioned Veteran's Exemption Act, provides as follows:

Section 11. No license herein provided for shall be issued in any county other than the county wherein the disabled veteran is a bona fide resident, provided, however, that should a disabled veteran holding a veteran's license desire to engage in a business or occupation in a county in this State other than the county in which he has secured such veterans license, he shall produce the license issued to him in the county of his residence to the probate judge of the county where he desires to do business and if the license in such other county together with the license issued in the county of his residence does not exceed the Twenty Five (\$25.00) exemption herein granted he

shall be exempt to such extent, and such probate judge shall countersign the license obtained in his county without charge or fee and it shall thereafter be as valid as though issued by the probate judge of the county of his residence."

Answering your first inquiry, I wish to advise that under the provisions of Section 11, above quoted, a veteran otherwise qualified is entitled to an exemption from county licenses in each county in which he does business provided the licenses issued do not in the aggregate exceed the \$25.00 exemption granted by Section 3, supra.

For example, if an applicant for exemption under Section (b) of Schedule 146, as amended, procured an exemption from the \$10.00 license due the county in Marengo County, the County of his residence he would be entitled to an exemption of \$10.00 in Dallas County should he choose to go there and if he then desired to go into Montgomery County, he would be entitled to \$5.00 exemption on the \$10.00 license in such county. If he then chose to proceed to Pike County, he would be entitled to no further exemption, the \$25.00 exemption having been consumed.

You next inquire whether a state license should be issued for every county in which the business is conducted under Schedule 146 (b) as last amended.

In my opinion the itinerant vendor or peddler dealt with under Schedule 146 (b) is required to take out a state license in each county in the state in which he engages in business.

Your attention is directed to an opinion rendered under date of June 23, 1938 to Hon. Wm. Varner, Judge of Probate, Macon County, the reasoning adopted therein being applicable to the conclusions reached in this regard. A copy of said opinion is herewith enclosed for your information.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Filing Fees: When a deed is offered for record conveying property sold under contract, which contract has been recorded by paying the deed tax on the down payment and the mortgage tax on the balance due under the contract, said deed should be recorded without the payment of a privilege tax on the same.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"Please advise us at your earliest convenience what tax to charge on the following deed:

"Mr. A. agrees to sell to Mr. B a vacant lot for the sum of \$3,300.00 payable as follows: One thousand (\$1,000.00) Dol-

lars cash, and \$2,300.00 in balance to be paid on a certain date without interest. Parties of the first part covenant that upon the payment of the \$2,300.00 balance they will execute a deed with full covenants of warranty to the party of the second part.

"When the purchase contract was filed for record a deed tax of \$1.00 for the \$1,000.00 down payment and mortgage tax on the balance of the agreed price, \$2,300.00, was charged. Now the Deed comes to record and we wish to know if we must charge a deed tax on the full consideration since the tax was paid on the purchase contract."

In my opinion, when the contract was filed for record, you were correct in charging a deed tax on the down payment and a mortgage tax on the balance due under the contract as provided by Schedules 94 and 46 of the 1935 Revenue Act. Opinion to Judge W. M. Vaughan of Dallas County, rendered on June 29, 1934.

In the case of **Thompson v. Smith**, 174 So. 797, Justice Foster speaking for the Court, said:

"So that we think, when there is a contract of sale of real or personal property by which either the title is reserved in the vendor as security for the debt, or by which the title passes and what is known as a lien is reserved for that purpose, and such instrument is offered for record, there is due to be paid both the mortgage tax and the deed tax, as provided in Schedules 94 and 46, supra, respectively."

When the deed is recorded, no privilege tax should be charged on the same, as the deed tax has already been paid on the down payment and the mortgage tax on the balance due under the contract.

In **Thompson** case, supra, the Court said:

"A deed or conveyance is but evidence of what the parties have agreed."

Our Constitution and statutes seek to avoid double taxation. — **State v. National Cash Credit Ass'n.**, 224 Ala. 629, 141 So. 541.

I am familiar with the case of **Hawkins v. Pure Oil Co.**, 232 Ala. 660, 169 So. 307, but in that case there was no question of double taxation as the recording tax had never been paid on the deed.

Therefore, it is my opinion that you should allow the recordation of the deed without collecting any privilege tax on the same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. Hunter Phillips,
Tax Assessor,
Choctaw County,
Butler, Alabama.

Taxation — Homestead Exemption —
Act 107, General Acts 1936-37, p. 113.

A building operated primarily for a hotel although occupied in part by the owner as a residence, is not entitled to a homestead exemption.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of June 4, 1938, wherein you request my opinion as follows:

"Mr. W. B. Adams operates a hotel in Butler, of about twenty rooms, and he and his family live in this hotel and make it their home. Mr. Adams entire income is made from the operation of the hotel. Please advise me if Mr. Adams will be entitled to the exemption under the Homestead Exemption Act, approved March 12, 1936."

Your question must be answered in the negative. I assume that the exemption to which you refer is that found in General Acts 1936-37, p. 113.

The Supreme Court of Alabama in discussing a question similar to the one involved herein in the case of **Garrett vs. Jones**, 95 Ala. 96, stated the general proposition as follows:

"Where the trade adaptation and use of a building is incidental or secondary only to its habitation as a dwelling — where the chief use of the structure is that of a home for the owner, and some part only not essential to this end is fitted up and used as a shop, an office or salesroom — it is a homestead; but, when this state of facts is reversed, and the residence feature is only auxiliary to the business use — where only a relatively small part of the building is devoted to the uses of habitation, and the chief adaptation and use are those of business — the building is not a homestead, even though the occupant have no other home, and uses this for all the purposes of living."

The court in this opinion speaking specifically as to the situation involved in your question stated:

"The owner of a hotel erected for and adapted to the purposes of public entertainment would not have homestead therein, though he resides there with his family."

The Supreme Court has further stated in the case of **Turner vs. Turner**, 107 Ala. 465:

"A building built for, adapted to, and used as a hotel by the owner who conducts the business, cannot be claimed as a homestead even though the owner resides therein as an incident to his business."

From the facts as you state them, it will be seen that the dominant use of the building of Mr. Adams is that of a hotel and its use as a residence is merely incidental or secondary to the business. See further **Opinions of Attorney General, Quarterly Reports**, Vol. VIII, p. 80 and Vol. X, p. 9.

From the above quoted authorities, it is my conclusion that the property described by you does not come within the definition of a homestead as defined by the Constitution, Section 205, and is, therefore, not entitled to the exemption under the Homestead Exemption Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. W. L. Pratt,
Judge of Probate,
Bibb County,
Centerville, Alabama.

Bibb County -- Time when county superintendent of education, elected at general election in 1938, assumes office.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of June 21, which is as follows:

"Please advise when the Superintendent of Education of Bibb County who will be elected in the next November General Election will take over the duties of that office."

In reply to your inquiry I refer you to Section 2 of Act No. 99, Local Acts 1933, page 31, which is as follows:

"That the said Superintendent of Education so elected shall take over the duties of the office and commence his term of office on the first Monday after the second Tuesday in January 1935; that the term of such Superintendent of Education so elected shall be for four years, or until his successor shall be elected and qualified. And at the General Election to be held in this State every four years next after the General Election to be held in November 1934, a County Superintendent of Education shall be elected by the qualified voters of Bibb County, Alabama, and such successors in office shall commence their terms of office on the date of the expiration of the term of office of their predecessors, viz: first Monday after the second Tuesday in January, and shall continue in office until another successor is elected and qualified." (Italics supplied).

Therefore, I am of the opinion that the County Superintendent of Education of Bibb County, who will be elected in the coming general election this November, will take office the first Monday after the second Tuesday in January, 1939. Such are the expressed terms of the Act in question. See opinion of this office to Mrs. Marguerite P. Hayes, Centerville, Alabama, under date of April 15, 1935, Office Edition, Vol. 3-A, page 176, copy of which is herewith inclosed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Pawnbrokers are not subject to the excise tax as provided by Section 346.2 of the Revenue Act of 1935, (General Acts, 1935, p. 428).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"An opinion is requested as to whether or not pawnbrokers engaged in the business of lending money on pledged merchandise or other personal property are subject to the excise tax, Article 12, Chapter I of the Law imposing an excise tax on financial institutions. The term 'Financial Institution' is defined in Section 346.1 (a) of the Act.

"Inasmuch as this office is now engaged in a drive to investigate returns and secure delinquents of all taxpayers classified under the Excise Tax Law, it will be appreciated if you will advise immediately."

In my opinion your question should be answered in the negative. The excise tax referred to by you is levied in Section 346.3, Revenue Act 1935, (Simon's Code, p. 205) and is a tax at the rate of six per cent on the net income of financial institutions.

"Financial Institution" is defined in Section 346.1 subdivision (a) (Simon's Code, p. 202) as follows:

"'Financial Institution' shall mean and include any person, firm, corporation, and any legal entity whatever doing business in this state as a national banking association, bank, banking association, trust company, industrial or other loan company, building and loan association, and shall likewise include any other institution or person employing moneyed capital coming into competition with the business of national banks, and shall apply to such person or institution regardless of what business form and whether or not incorporated, whether of issue or not, and by whatsoever authority existing. 'Financial Institution' shall not mean or include individual citizens and fiduciaries acting in a representative capacity for individual citizens, not engaged in a banking, loan, investment or similar business, but merely making personal investments of personal or fiduciary funds in bonds, notes, or other evidences of indebtedness and not made in competition with the business of national banks, nor shall such term apply to insurance companies or insurance associations making merely investments of reserves in bonds, notes, or other evidences of indebtedness and not made in competition with the business of national banks."

The Supreme Court in the case of *Title Guarantee Loan & Trust Co. vs. State*, 228 Ala. 636, 639, stated:

"As noted in our recent cases of *Union Bank and Trust Co. vs. S. H. Blan, Individually, etc., supra* and *Union Bank & Trust Co. v. R. C. Phelps, Individually, etc. (Ala. Sup.)* 153 So. 644, the statute grew out of and was intended to remedy a situation disclosed in *Phelps v. Union Bank & Trust Co.,* 225 Ala. 238, 142 So. 552, and *Ward, Tax Collector, v. First National Bank of Hartford,* 225 Ala. 10, 142 So. 93, 95."

The last cited cases, *Ward v. First National Bank of Hartford* and *Phelps v. Union Bank & Trust Co., (Supra)*, involved the question of taxing the stock of national banks and the Supreme Court held that the state tax on national bank stock was an unlawful discrimination in that the tax was not equal upon all who competed with national banks in the manner in which they employed their capital.

The purpose of this act will be seen in the words of the Supreme Court in the case of *Title Guarantee Loan & Trust Co. v. State, supra*, at p. 639:

" * * * the major purpose of the act was to levy an excise tax for the privilege of engaging in the business of banking in the State of Alabama, and of conducting a financial business employing moneyed capital coming into competition with the business of national banks, so that national banks as well as state banks would be amenable to the law."

The only place where a pawnbroker might be said to come under the definition of "financial institution" as defined by Section 346.1, *supra*, would be perhaps in the term "employing moneyed capital coming into competition with the business of national banks." The courts have defined the meaning of these words. In *Mercantile Bank v. N. Y.,* 121 U. S. 138, the court stated:

"Moneyed capital is brought into such competition where it is invested in shares of state banks or in private banking, and also where it is employed, substantially as in the loan and investment features of banking in making investments by way of loan, discount, or otherwise, in notes, bonds or other securities with a view to sell or repayment and reinvestment."

A pawnbroker has been defined as follows:

"The word 'pawnbroker' has been variously defined as any person whose business or occupation is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise or any kind of personal property whatever, as security for payment of money loaned thereon. One who makes a business of loaning money for interest and receives personal property in security for the payment of the same. Or, again, a pawn is a pledge to a pawnbroker or person who keeps a shop for the purchase or sale of goods and takes goods by way of security for money advanced thereon." Words and Phrases, Second Series, Vol. III, p. 924.

From the above quoted authorities, it is my opinion that pawnbrokers do not come within the definition of "financial institutions," and therefore, are not subject to the excise tax imposed by Article 12, Chapter 1, of the law imposing an excise tax on financial institutions.

You will note that under the 1935 Revenue Act, a pawnbroker is subject to a license tax. See Schedule 103, (Simon's Code, p. 269).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. J. Oppenheimer,
Member of the Board of Revenue,
Eufaula, Alabama.

1. Coroner, before he proceeds to hold an inquest must follow strictly Section 4557, Code of Alabama, 1928, (Michie's), and unless the provisions of this section are followed strictly, the county would be without authority to pay the cost of such inquest.

2. An inquest may be held by any Justice of the Peace when the coroner is absent from the county or is unable to act.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date wherein you request my opinion as follows:

"The body of Ed Cox was found dead in Beat 16, Barbour County, near Baker Hill in December of 1937. Oscar Wilson a Notary Public ex officio Justice of the Peace, summoned a coroner's jury and held an inquest. The jury rendered a verdict that deceased came to his death by natural cause.

"There was no inquest ordered by any Judge of a Court of Record or by any solicitor. A physician was summoned and testified. A bill was presented for \$51.00 to the Board of Revenue of Barbour County, and payment refused by reason of no orders from the authority provided in Section 3751 of the Code.

"On April 1st, 1938, the Notary — acting as coroner, although this County has an official coroner — secured an order from the Probate Judge, dated April 1st, 1938, **approving** the inquest of December, 1937.

"Query: Would this inquest of December 1937 holding deceased came to his death from natural causes, which inquest was held without any order of any Court or Solicitor, be proper charge against Barbour County, if an order approving the inquest was not granted until April 1st, 1938?"

It is my opinion under the facts stated by you, that the county is without authority to pay any of the expenses of this inquest. Section 4557, Code of Alabama, 1928 (Michie's) provides as follows:

"Section 4557. PROCESS OF HOLDING CORONER'S INQUEST; JURY OF INQUEST SUMMONED BY CORONER. — When a coroner has been informed that a person has been killed, or suddenly died under such circumstances as to afford a reasonable ground for belief that such death has been occasioned by the act of another by unlawful means, he must forthwith make inquiry of the facts and circumstances of such death by taking the sworn statement in writing of the witnesses having personal knowledge thereof, and submit the same to a judge of a court of record or a solicitor; and if, upon such preliminary inquiry the judge or solicitor is satisfied from the evidence that there is reasonable ground for believing that such death has been occasioned by the act of another, by unlawful

means, he must direct the coroner to forthwith summon a jury of six discreet householders of the county to appear before him forthwith at a specified place and inquire into the cause of such death, but no person shall be liable to serve as a juror more than one time during any one year, and no person shall be paid compensation for services as a juror on more than one inquest during one year."

The inquest in your particular case was held by a notary public as ex officio Justice of the Peace, but there is nothing in your facts showing why the coroner did not act. Section 4570, Code of Alabama, 1923, provides as follows:

"Section 4570. WHEN INQUEST HELD BY JUSTICE OF THE PEACE; FEES. — If the coroner is absent from the county, or is unable to act, any justice of the peace may hold an inquest on the body of any deceased person, under the rules and regulations in this chapter prescribed; and is entitled to the same compensation for his services that is by law allowed to the coroner."

It will be noted, therefore, that before a justice of the peace can act in such a case the coroner must be absent from the county or unable to act. Further, before an inquest can be held, an order must be secured from a Judge of a Court of Record or a solicitor, while in your case this was not done and the subsequent order made by the Judge of Probate on April 1, 1938, approving the inquest is without authority of law and void since the attempted inquest was held in December, 1937. See further Biennial Report of Attorney General, 1928-30, p. 906.

It is my opinion that this inquest is not a proper charge against Barbour County nor can the doctor's fee of \$5.00 be paid since Section 4569, Code of Alabama, 1923, provides that a surgeon or physician must be "duly summoned by the coroner" which was not done in your situation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. W. L. Pratt,
Judge of Probate,
Bibb County,
Centreville, Alabama.

Commissioners Court may employ a pay roll clerk for road construction and pay the salary of said clerk out of the county's share of the State Gasoline Tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of recent date wherein you request my opinion as follows:

"Please advise if the Commissioners Court of Bibb County can employ a pay roll clerk for the road construction and pay a reasonable salary out of the gasoline money."

I do not find any local act governing the power of the Commissioners Court of Bibb County with reference to the construction, maintenance and improvement of public roads. In the absence of such a local act, Bibb County is governed in this respect by general law. Section 157, General Acts, 1926-27, p. 391, provides as follows:

"The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this State have general supervision of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this article. **Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state.** They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; * * * " (Italics supplied).

You will note that the court of county commissioners therefore is a court of unlimited jurisdiction and powers with reference to roads and bridges except as limited by local act or special statutes. A pay roll clerk may be necessary in the construction, maintenance and improvement of the public roads of Bibb county, and if such is the case the commissioners court has the power to employ such a pay roll clerk. See *Biennial Report of the Attorney General, 1928-30, p. 977.*

You refer in your request to paying the salary of the pay roll clerk out of the gasoline money. I assume you refer to the county's share of the State gasoline tax.

It is my opinion, based on the reasoning in an opinion by the Attorney General, found in *Quarterly Reports, Vol. X, p. 196*, that the commissioners court may pay a reasonable salary for a pay roll clerk out of this fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Judge of Probate authorized, within sound discretion, to continue from term to term the hearing of petitions filed by the tax collector for the sale of land for taxes, provided cause is contested and written consent of taxpayer and tax collector filed and noted on the docket,

but such continuance shall not be beyond the next succeeding term. (Revenue Laws of 1935, Section 220).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 26, 1938, in which you request my opinion as follows:

"Please give me your Opinion as to whether or not Section 220 of the Revenue Acts of 1935, G. A. 1935, page 354, contains a legal prohibition against a judge of probate or the Probate Court in the matter of continuances from term to term of the day set for hearing petitions of the Tax Collector for sale of land for taxes, whether the petition of the Tax Collector is, or is not, contested and whether the tax-payer has, or has not, entered into the agreement mentioned in said Section."

Answering your inquiry, I wish to advise that Section 220 of the Revenue Acts of 1935, (Simon's Revenue Laws, page 109), authorizes a continuance of a hearing of petitions filed with the tax collector for sale of land for taxes under certain specific conditions.

Section 220 provides as follows:

"Such cause shall be triable at the term named in said notice, and unless the cause is contested at the trial term the Judge of Probate shall forthwith issue his decree for the sale of lands, but if the cause is contested, the court with the written consent of the taxpayer and the Tax Collector, filed in the case and noted on the docket, may for good and sufficient reason continue any cause, but such continuance shall not be beyond the next succeeding term. The fact of such agreement shall be noted on the docket, and such continuance shall not necessitate a re-publication of the notice."

You will note that the cause shall be triable at the term named in the notice, in the absence of certain stated prerequisites which are as follows and which **must** exist before the Judge of Probate may continue any cause:

1. The cause must be contested.
2. Written consent of the taxpayer and the tax collector must be filed in the case and noted on the docket.
3. There must be good and sufficient reason existing in the mind of the Judge of Probate to continue the cause.
4. The fact of such agreement shall be noted on the docket.

When the foregoing provisions have been complied with, then the Judge of Probate may continue the cause, but in no case shall such continuance be beyond the next succeeding term.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act —

Board may not make rules and regulations referring to dispensing of wines or beverages acquired under Section 58 of the Act.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of May 12, 1938, in which you request my opinion as follows:

"Subsection (a) of Section 7 of the Alabama Beverage Control Act reads as follows:

"Section 7. (a). The Board may from time to time make such regulations not inconsistent with this Act as it may deem necessary for carrying out the provisions of this Act, and from time to time alter, repeal or amend such regulations, or any of them."

"I would like to have your opinion on the question of whether the Alabama Alcoholic Beverage Control Board has authority to make rules and regulations with reference to the ownership and dispensing of wines, other alcoholic beverages, or ethyl alcohol, acquired under the provisions of Section 58 of the Alabama Beverage Control Act, or Sections 4736 to 4739 of the 1923 Code of Alabama."

In my opinion your question should be answered in the negative. Section 58 gives to the parties specified therein the unrestricted right to acquire and dispense the beverages referred to therein. The authority of the Board to make regulations is limited to those "not inconsistent with this Act." As the Act specifically authorizes the ownership and dispensing of wines, etc. by the parties named in Section 58, a rule or regulation by the Board would in my opinion be inconsistent with the provisions of Section 58 and unwarranted. If a certain matter is covered in that section, the Board is not authorized to promulgate a rule or regulation contrary thereto. Cf. Quarterly Report, Vol. X, page 110.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 8, 1938

Hon. C. E. McNatt,
Clerk, Circuit Court,
Franklin County,
Russellville, Alabama.

Costs —

1. Costs in misdemeanor cases not payable by the State unless county has adopted appropriate proceedings under the Act of 1927, page 51, for the delivery of county convicts to the board of Administration.

2. Where convict is sentenced to life imprisonment on a felony charge and is also sentenced to hard labor on a misdemeanor charge and county has made provisions for delivery of hard labor convicts to the State Board of Administration, convict department is required to pay the costs in the misdemeanor case at the time of delivery of the convict to the State Board of Administration.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"One Alvie Hughes was sentenced in the Circuit Court of Franklin County on a charge of carnal knowledge of a girl under twelve years of age to life imprisonment on October 29, 1932. Said life sentence was suspended pending an appeal and the Supreme Court affirmed said sentence on March 8, 1934.

"While said Alvie Hughes was in the county jail pending appeal in said carnal knowledge case, he was tried in the Law & Equity Court of Franklin County on a charge of defacing the county jail and given a hard labor sentence on Sept. 7, 1933. Said hard labor sentence was suspended pending appeal and was affirmed on February 26, 1935, by the Court of Appeals.

"Said Alvie Hughes is now in the state penitentiary. The Board of Administration paid the cost in the felony case of carnal knowledge but has not paid the court costs in the hard labor case for defacing the county jail. The Board of Administration contends that Hughes must serve all of his life sentence before the hard labor sentence will begin. The Board of Administration contends that the state should not pay the costs in the hard labor case until the hard labor sentence begins.

"Please advise me if the Board of Administration should pay the costs in the hard labor case now, if not, when should said court costs be paid?"

You do not advise in your letter whether Franklin County has arranged for the delivery of its hard labor convicts to the State Board of Administration, pursuant to the provisions of the Act of 1927, page 51. If not, there is no authority requiring the payment of costs in the hard labor case by the Convict Department, but the cost in such hard labor case should be handled in the usual manner, that is, by issuing execution against the defendant, and if the execution is returned "No Property Found" then this would become a charge against the Fine and Forfeiture Fund of the county.

I think I may be safe in assuming from the general tone of your letter that Franklin County has such an arrangement with the State Board of Administration for the delivery of county convicts, pursuant to said Act of 1927. Section 2 of said Act provides:

"The State Board of Administration shall receive said county convicts in the same manner as they now receive state convicts, and shall pay to the proper county authorities the items of costs provided in Section 3667 of the Code of Alabama as now provided by law."

There is no provision in said Act as to the time for the payment of said costs by the State to the proper county authorities. Code Section 3667 provides for the payment of certain items of cost by the State in felony cases. This section appears in Article 3, Chapter 106 of the Code of 1923, "Costs and Earnings in Felony Cases." At the time of the codification of these statutes in 1923, there was, of course, no provision for the payment of cost in misdemeanor cases by the State for it was not until the Act of 1927, supra, that such arrangements could be made. Section 3670, appearing also in said Article 3, Chapter 106, Code of 1923, provides:

" * * * No costs shall be paid, until the convict has been delivered to the penitentiary officials, and, where a convict is sentenced in more than one case, the costs in the succeeding cases shall be paid when he is delivered to such officials."

This section was changed from the same section in the Code of 1907 (Section 6575, Code of 1907), which provided that where the convict was sentenced in more than one case, the costs of the succeeding cases should not be paid until the convict had served the preceding sentences. See opinions of the Attorney General, 1922-24, page 15. It is, therefore, apparent that the Legislature intended, at least in felony cases, to assure the clerk of his cost money in all cases as soon as the convict was delivered to the penitentiary officials.

In my opinion, the adoption of the Act of 1927, page 51, and the proper action of the county authorities, pursuant to such statute, make the provisions of said Article 3, Chapter 106, of the Code of Alabama of 1923, equally applicable to misdemeanor cases as to felony cases.

The further question then comes up as to when the convict was delivered to the penitentiary officials so as to make the costs payable under Section 3670 and the other statutes cited above. The facts set out in your letter show that Hughes was sentenced on the felony charge on October 29, 1932, but the sentence was suspended pending appeal. He was sentenced on the hard labor charge on September 7, 1933, but this sentence was suspended pending appeal. The felony case was affirmed on appeal on March 8, 1934, and I assume that Hughes was immediately delivered to the penitentiary officials. It was not until some time later and on, to wit, February 26, 1935, that the hard labor sentence was affirmed by the Court of Appeals. At the time, therefore, of the delivery of the convict to the penitentiary officials, the hard labor sentence was suspended and Hughes was not delivered to the penitentiary authorities on both charges at that time. However, he was delivered to the penitentiary officials, and upon the affirmance of the hard labor sentence, he could not again be delivered to the Convict Department for the reason that the Convict Department already had him in the penitentiary. To require the county to deliver possession of a convict to the penitentiary officials where the penitentiary officials already have the convict in charge would be to require a useless and impossible act. It is, therefore, my opinion that the proper construction of Section 3670 is that where an appeal is taken in the second conviction and the convict is delivered to the penitentiary officials on the first charge, upon the affirmance of the second conviction, there is a constructive delivery of the convict under such second conviction so as to entitle the clerk to costs immediately upon the affirmance of said second conviction. It is further my opinion that this is applicable both to convictions of two felonies, convictions of a felony and subsequent conviction of a mis-

demeanor, or a conviction of two misdemeanors, where the proper steps have been taken, pursuant to the Act of 1927, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 8, 1938

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act —

The Beverage Control Board held without authority to promulgate regulation prohibiting erection of signs or billboards advertising malt or brewed beverages within 200 feet of any place of business at which such beverages are sold.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"On February 25, 1938, you rendered an opinion whereby the Alabama A. B. C. Board did not have authority to promulgate rules and regulations designating locations of billboards used to advertise malt or vinous beverages.

"Section 28 reads in part as follows: 'There shall be no electric signs, painted signs, etc. displayed outside any place of business advertising alcoholic beverages as enumerated and defined.'

"In your opinion of July 29, 1937, you defined what constituted a billboard and since that date the various breweries making shipments into this state by and through local wholesalers and distributors have been erecting and placing these signs or billboards just off the premises of licensed retailers duly licensed to sell beverages advertised on said billboards.

"After considering all of the law involved in the above, please advise us whether or not the Alabama A. B. C. Board has the authority to promulgate a rule and regulation whereby it would be unlawful to erect a sign or billboard within 200 feet of a place duly licensed to sell alcoholic beverages."

I have examined the opinions referred to above. The opinion of July 29, 1937, referred to in your letter is reported in Quarterly Reports of Attorney General, Vol. VIII, p. 48. I call your attention to the language of that opinion on p. 51 thereof, which is as follows:

"This holding does not conflict with the provisions of the Act contained in Section 28 thereof, which is referred to in your letter of May 5, to the effect that 'there shall be no electric signs, painted signs, etc., displayed outside any place of business advertising alcoholic beverages as enumerated and defined.' This provision, in my

opinion, was intended to prohibit such a sign being placed immediately outside of a place of business where alcoholic beverages were sold, for the purpose of advertising the fact that such beverages were sold therein, and was not intended to apply to or place any restriction on such advertising by means of 'billboards', which, as I have hereinabove stated, are generally regarded as large structures or boards placed usually along public streets or highways for advertising purposes."

The pertinent provisions of the Alabama Beverage Control Act dealing with advertising are Sections 10 and 28. Section 10 provides in part as follows:

"There shall be no advertising of alcoholic beverages as enumerated and defined herein, except through newspapers, magazines, and radio broadcasting stations, provided, however, that malt or vinous beverages as herein defined may be advertised by means of billboards."

Section 28 provides in part as follows:

"There shall be no electrical signs, painted signs, etc., displayed outside any place of business advertising alcoholic beverages as enumerated and defined. * * *

"The Alabama Alcoholic Beverage Control Board shall have authority to promulgate rules and regulations for the carrying out of this section."

The other opinion referred to by you is now reported in Quarterly Reports of Attorney General, Vol. X, p. 110. In that opinion I called attention to the fact that while the board did not have authority to regulate the location of billboards, such billboards must be otherwise lawfully located.

Your request now involves the interpretation of the words "outside any place of business" contained in Section 28, supra.

It is my opinion the Alabama Alcoholic Beverage Control Board has the authority to make reasonable rules and regulations pursuant to the proviso contained in Section 28 quoted above. The question then remains as to whether a regulation prohibiting the erection of signs or billboards within 200 feet of a place duly licensed to sell alcoholic beverages is a reasonable regulation. It is my opinion that a rule or regulation prohibiting the erection of a sign or billboard within 200 feet of a place duly licensed to sell alcoholic beverages would be inconsistent with the terms of the act authorizing advertising by billboards. It is evident that the purpose of Section 28, supra, was to prevent calling attention to the fact that alcoholic beverages were on sale at certain places, but you do not state in your request for opinion that the signs or billboards within two hundred feet of a place duly licensed to sell alcoholic beverages call attention to the fact that the beverages advertised are for sale at said place of business. Consequently, I express no opinion upon the question of whether or not the Board would have the authority to promulgate a rule or regulation prohibiting the erection of a sign or billboard within two hundred feet of a place duly licensed to sell alcoholic beverages if the sign or billboard called attention to the fact that the alcoholic beverages which it advertised were sold within said place of business.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 12, 1938

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation — Coal tar is not a raw material so as to be exempt from ad valorem taxation under subsection (1) of Section 2 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"The Barrett Company, of this city, purchases crude tar through a pipe line from the Tennessee Company.

"Under a ruling from the Tax Commission, we construed this to be taxable inasmuch as it was, in our opinion and that of the State Tax Commission, a finished product. The Barrett Company asked that we give them a specific ruling on this item of tar, as they construed it to be semi-manufactured or raw material.

"Inasmuch as they had purchased this material from another company who had derived the tar from coal, we construed it to be taxable."

In my opinion the coal tar purchased by the Barrett Company from the Tennessee Company is not a raw material, and is not exempt from ad valorem taxation.

Subsection (1) of Section 2 of the 1935 Revenue Act, provides as follows:

"SECTION 2. EXEMPTIONS. PERSONS AND PROPERTY. The following property and persons shall be exempt from ad valorem taxation and none other; * * * (1) All raw materials, including coke, produced during the current calendar year, when stocked at any plant or furnace, for manufacturing purposes in Alabama."

Exemptions from taxation must be strictly construed in favor of the taxing power. *State v. Tuscaloosa Cottonseed Oil Co.* 208 Ala. 610, 95 Sou. 52; *Hattemer v. State Tax Commission*, 177 Sou. 156; *Holt v. Long*, 234 Ala. 369, 174 Sou. 759; *Hawkins, Probate Judge, v. Pure Oil Company*, 232 Ala. 660, 169 Sou. 307.

My information is that the Tennessee Company takes the raw material, coal, and burns it, and that tar is one of the numerous by-products produced by the distillation of the coal.

In my opinion, the term "raw material" as used in the exemption, *supra*, means material which has not been changed by some process of treatment or fabrication, or material in its natural state. Any other construction would be placing a broader interpretation on the exemption in the statute than the statute itself.

The premises considered, it is therefore my opinion that the tar in question is not a raw material so as to be exempt from ad valorem taxation, but is a finished product made by the distillation of the raw material, coal.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 12, 1938

Hon. H. M. Couch,
Sheriff, Marion County.
Hamilton, Ala.

Bonds — Sheriff may file official bond with personal surety or with surety company.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of June 14, 1938, which is as follows:

"My official bond was made by National Surety Corporation, and the premium on this has been paid for the present year which carries it to the end of my term. Due to the fact that I have been harassed more or less by suits, in and out of the county, largely because of the fact that a surety corporation made my bond, I desire to file a new bond with personal sureties residing in Marion County. Is there any authority of law for this being done on my motion?

"I know, of course, that where my bond should be held by the proper authorities as being insufficient, I could be properly cited and required to make another bond. The thing that I desire relief against, however, is an entirely different proposition."

I am of the opinion that you, as Sheriff of Marion County, have authority to file a bond with personal surety rather than one with a surety company if you so desire.

In so far as the bond of a sheriff is concerned, Section 10185, Code of Alabama, 1923, has been superseded by Act No. 191, General Acts, 1933, p. 203 (Bains Act). Section 10 provides that the bond of a sheriff shall not be less than \$5,000. Section 19 thereof provides as follows:

"Section 19. All bonds provided for in this Act may be made by a surety company or surety companies authorized by their charters to make such bonds provided they are qualified to do business in this State or may be made with individual sureties or banks or other corporations qualified to do business in this State and authorized under their charters to make such bonds."

In view of the foregoing, I am of the opinion that your inquiry should be answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 12, 1938

Hon. Henry S. Long,
State Tax Commission,
Capitol.

Chain Store Act — Schedule 155.7, General Revenue Laws of 1935, as amended by Act of 1936-37, page 111 — Exception of place of business at which the principal business conducted is that of sell-

ing or distributing petroleum products, not invalid or unconstitutional.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 29, 1938, in which you request my opinion as follows:

"Under date of October 26, 1931, you rendered an opinion to the State Tax Commission with reference to the so-called Chain Store Act, House Bill 111, approved July 7, 1931, holding that the exception, contained in the Act, of the place of business at which the principal business conducted is that of selling or distributing petroleum products was unconstitutional and invalid.

"Subsequent to the rendering of this opinion the Legislature of 1935 enacted a General Revenue Law containing Chapter 3 with relation to chain stores. Schedule 155.7 of Chapter 3 was amended by Act No. 99, House 72, General Acts of 1936-37, approved February 18, 1937. This schedule as now amended contains the following:

"Term 'store' as used in this schedule shall not be construed to mean or include any place of business at which the principal business conducted is that of selling or distributing petroleum products. * * * "

"I will thank you to advise me whether or not the ruling of your office issued under date of October 26, 1931, as aforesaid, is in your judgment well-founded, and, second, whether said opinion is still applicable in view of the fact that the Legislature has re-enacted the Chain Store Law, as hereinbefore detailed."

In my judgment, the opinion of this office under date of October 26, 1931 (Biennial Report 1930-32, page 519) referred to in your letter must, in view of the recent decisions of the Supreme Court of the United States and of our own Supreme Court, be held to state an incorrect principle of law and the same is therefore withdrawn and this opinion substituted in its stead.

Schedule 155.7 of the so-called Chain Store Act (General Acts 1936-37, page 111) contains the following:

"Schedule 155.7. The term 'store' as used in this schedule shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained, controlled or for which the buying is done by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold, either at retail or at wholesale. The term 'store' as used in this schedule shall not be construed to mean or include any place of business at which the principal business conducted is that of selling or distributing petroleum products. * * * " (Emphasis supplied).

That the Legislation possesses the power to select the privileges and occupations upon which it imposes a license or privilege tax is a principle well settled by judicial decision in this state. See the recent case of *Nachman v. State Tax Commission*, 233 Ala. 628, 173, So. 25.

Conceding that the power to classify exists, the question next arises as to what classifications are proper. In 1 Cooley on Taxation, Section 334, we find the following rule stated with reference to the propriety of classifications, which rule is adopted by our Supreme Court in *State v. Alabama Educational Foundation*, 231 Ala. 11, 163 So. 527, 530, as follows:

"A particular classification is proper where based on a reason and not purely arbitrary. There must be a reason for the classification as distinguished from mere accident, whim, caprice, or vindictiveness. 'Clear and hostile discrimination' cannot be made under the guise of classification. A discrimination is not arbitrary, of course, where based on sound reason of public policy. On the other hand, **while there must be a reason for the classification, the reason need not be a good one, and it is immaterial that the statute is unjust.** The test is not wisdom but good faith in the classification." (Emphasis supplied).

This brings us to the question of whether or not the exemption of places of business at which the principal business conducted is that of selling or distributing petroleum products is reasonable or whether it is arbitrary and offends the constitutional provisions as to determination of the classes which shall be exempt from taxation. It is my opinion that this question may best be determined by an examination of those cases in which the particular point was at issue. A review of the authorities reveals the following three cases in which the direct point here under discussion has been before the State and United States Supreme Courts; *Liggett Company v. Lee*, 288 U. S. 517, 53 Sup. Ct. 481, 77 Law Ed. 929, 85 A. L. R. 699; *C. F. Smith Company v. Fitzgerald*, 259 N. W 352 (Mich.) appeal dismissed 56 Sup. Ct. 115, 296 U. S. 659, 80 Law. Ed. 470; *Southern Grocery Stores v. South Carolina State Tax Commission*, 55 Fed. (2nd) 931.

In the *Fitzgerald* case, *supra*, the Supreme Court of Michigan quotes with approval from the *Liggett Company* case, the court speaking as follows:

"Gasoline filling stations are in Michigan subject to ad valorem taxes on their real estate. The owners or operators thereof pay a gasoline tax to the state and another gasoline tax to the government of the United States. They are also subject to the general sales tax imposed by the state. We need add nothing to the reasoning of the Supreme Court of the United States in *Liggett Co. v. Lee*, 288 U. S. 517, 53 S. Ct. 481, 486, 77 L. Ed. 929, 85 A. L. R. 699, where it is said: 'Section 8, which defines a store, contains a proviso to the effect that the term shall not include "filling stations engaged exclusively in the sale of gasoline and other petroleum products." The appellants assert the exemption deprives them of equal protection, since it is arbitrary and unreasonable. It appears, however, that all dealers in gasoline, including those conducting filling stations, are required by statute to pay a license tax of \$5.00 per annum, and in addition a tax of seven cents per gallon for every gallon of gasoline or other like products of petroleum sold (Laws of Florida, Acts of 1931 (Ex. Sess.), chaps. 15659 and 15788). It has long been settled that the Fourteenth Amendment does not prevent a state from imposing differing taxes upon different trades and professions or varying the rates of excise upon various products. *Bell's Gap R. Co. v. Pennsylvania*, 134, U. S. 232, 237, 10 S. Ct. 533, 33 L. Ed. 892, 895; *Southeastern Oil Co. v. Texas*, 217 U. S. 114, 121, 122, 30 S. Ct. 496, 54 L. Ed. 688, 692, 693. Clear and

hostile discriminations against particular persons and classes especially such as are of an unusual character, unknown to the practice of our governments, may be obnoxious to the Constitution, but, in view of the imposition of taxes on the operation of filling stations by other acts, pursuant to the Legislature's power of classification, we cannot declare their exemption from the tax laid by the Chain Store Act offensive to the guaranties of the Fourteenth Amendment.'

"We find nothing in the exemption in question which violates either the Constitution of this state or the Constitution of the United States."

It is to be noted that Section 2 of the Michigan Chain Store Act (Public Acts 1933, No. 265) contains the following proviso which is very similar to that employed in the Alabama statute:

"Provided that 'store' as herein defined shall not be held to include any place or places of business commonly known as gasoline filling stations or gasoline bulk plants which deal primarily in the selling or distribution of petroleum products."

In the Southern Grocery Stores case, *supra*, we find the following statement:

"There can be no question, we think, but that the exemption of gasoline filling stations from the tax rests upon a reasonable classification. Such stations as a general rule sell only gasoline and other articles of merchandise upon which the state collects a heavy excise tax, and it was doubtless for this reason that they were exempted from the tax in question. Furthermore, such filling stations are quite distinct from ordinary stores or mercantile establishments. Of course, if the operator of a filling station should operate a store or mercantile establishment in connection therewith, such stores would unquestionably be subject to the tax prescribed by the statute."

The principles announced in the foregoing cases are equally applicable to the exemption here under discussion. Under our revenue laws gasoline filling stations bear a special tax (Revenue Laws of 1935, Schedule 67, as amended, Simon's Revenue Code, page 242). Furthermore, there is a special excise tax on gasoline itself (Schedule 156 of the Revenue Laws of 1935, Simon's Revenue Code, page 305, et seq.).

The imposition of these special taxes furnishes, in my judgment, sufficient basis for the classification. As stated in the Alabama Educational Foundation case, *supra*, it is not for us to say whether the reason for the classification be a good one, "the test is not wisdom but good faith in the classification."

Premises considered, it is my opinion that the exception contained in Schedule 155.7 of the General Revenue Laws of 1935, as amended by Acts 1936-37, page 111, of the place of business at which the principal business conducted is that of selling or distributing petroleum products, is a reasonable and valid classification and does not offend either the State or Federal Constitutions.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 13, 1938

Hon. J. Lee Smith,
Probate Judge,
Chilton County,
Clanton, Alabama.

Court of County Commissioners of Chilton County have authority to pay assistant superintendent in charge of W. P. A. work on county roads, claims for mileage, without the approval of the road supervisor.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date in which you state:

"The Works Progress Administration of the United States of America are furnishing about one hundred laborers to aid in the rebuilding and repair of the bridges in this county, which were damaged and destroyed by floods on April 7. The assistant superintendent in charge of this labor, has filed a claim with the Court of County Commissioners, for \$105.00, for mileage covered by him during the month of May, 1938, in supervising and inspecting these men while on the job and in the performance of their duties. These bridges are widely separated and this assistant superintendent advises that under government regulations, it is necessary that he visit the place where each of these men are working each day.

"Please refer to the local law, authorizing the appointment of a road supervisor for Chilton County (General and Local Acts Alabama, Extra Session, page 4), and especially Section 9 of this Act (page 7). Please also refer to the recent decision of the Supreme Court in the case of John T. Thompson vs. Chilton County et als, construing this action. This decision was rendered on May 19, 1938, and is in manuscript."

You request my opinion as follows:

"We would like to be advised whether or not the Court of County Commissioners would be authorized to pay the assistant superintendent the claim for mileage, hereinabove referred to, without the approval of the road supervisor."

In my opinion your question should be answered in the affirmative.

I have been informed that before this project was placed in operation the Commissioners Court agreed to furnish the assistant superintendent transportation in the form of mileage.

Section 1347 of the 1923 Code of Alabama provides as follows:

"Section 1347. POWERS OF COURTS OF COUNTY COMMISSIONERS WITH REGARDS TO ROADS, BRIDGES AND FERRIES. — The courts of county commissioners, boards of revenues, or other like governing bodies of the several counties of this State have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative,

judicial, and executive powers, except as limited in this article, courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate, and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

In the recent case of *Thompson v. Chilton County*, handed down by the Supreme Court on May 19, 1938, (in MS.) Judge Knight speaking for the Court said:

"By Section 1347 of the Code the courts of county commissioners, or like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties, and may establish new, and change and discontinue old roads, bridges and ferries in their counties. To this end they are given legislative, judicial and executive powers, except as limited in and by the statute. These courts are courts of **unlimited jurisdiction and powers as to the construction, maintenance and improvement** of the public roads, bridges and ferries, except as their jurisdiction may be limited by the local or special statutes of the state. They are given by law the authority and power to establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary and advisable; to build, construct and maintain a good system of public roads and bridges, and regulate the use thereof.

"But it is insisted by appellant that this general superintendence, and other powers and duties with respect to the public roads of Chilton County, conferred by the general law (Code, Section 1347) upon the court of county commissioners of said county, were taken from the said court by the local act of 1936.

"It has been repeatedly held by this Court that, in performance of their duties with reference to the location, erection, repair or removal, 'or in the furnishing of the county's buildings, bridges and roads,' the court of county commissioners exercise a function that is quasi legislative. — *Ensley Motor Car Co. v. O'Rear, Treas.*, 196 Ala. 481, 71 So. 704; *Matkins v. Marengo County*, 137 Ala. 155, 34 So. 171; *Talley v. Jackson County*, 175 Ala. 644, 39 So. 167; *Eutaw v. Coleman*, 189 Ala. 164, 66 So. 464; *Commissioners' Court v. Hearne*, 59 Ala. 371; *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730.

"By the Local Act of 1936, the Legislature created in and for Chilton County the office of Road Supervisor, with power in the Governor to appoint the supervisor to serve until the first Monday in February, 1939, and thereafter the Court of County Commissioners are required to appoint the supervisor.

"By Section 3 of the Act the Road Supervisor may be removed by the Commissioners Court of Chilton County, for neglect of duty, or for any other cause which would furnish grounds for impeachment of public officers.

"By Section 5 of the Act the duty imposed upon, and authority vested in the Road Supervisor, as to building or repairing the public roads and bridges in Chilton County, are expressly declared to be subject to the control of the Commissioners' Court, as set forth in the Act.

"To be sure the Road Supervisor is charged with the duty of supervising the construction, maintenance and repairing the public roads in said county, but this does not mean that he displaces, in this respect, the court of county commissioners, and that this court is stripped of its statutory powers conferred upon it by Section 1347 of the Code. This supervisor is required to be a civil engineer, and his duties and authority in no wise conflict with the general powers of the court. He is in immediate charge of the construction, maintenance and repair of the roads, but his duties are purely ministerial, and subordinate to the Court of County Commissioners. — **Court of County Commissioners of Pike County v. Johnson**, 229 Ala. 417, 157 So. 481; **Arledge v. J. D. Pittman Tractor Co., Inc.** (MS).

"A consideration of the Act of 1936, supra, convinces us that there was no legislative purpose to transfer the powers vested in the Court of County Commissioners of Chilton County from the court and vest the same in the road supervisor. If such had been the legislative mind, different language and different terms would have been employed. Repeal of statutes by implication is not favored, and in this local act we find nothing which would give rise to an inference that it was the legislative purpose to deprive the Court of County Commissioners of its legislative, executive and judicial functions with respect to the public roads, bridges and ferries in said county. The said local act in no wise conflicts with Section 1347 of the Code, nor does it deprive the court of county commissioners of any power or authority conferred upon it by said Section 1347 of the Code."

The premises considered, it is therefore my opinion that the Court of County Commissioners of Chilton County may pay the assistant superintendent in charge of the W. P. A. work on the county roads, mileage, without the approval of the road supervisor.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 14, 1938

Hon. H. A. Terry,
Judge of Probate,
Hale County,
Greensboro, Alabama.

Judges of Probate —

The appointee for an unexpired term holds his office until the next general election held at least six months after the vacancy oc-

curs, and until his successor is elected and qualified; the successor chosen at such election shall hold office for the unexpired term and until his successor is elected and qualified.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of July 2, 1938, which is as follows:

"Please inform me immediately when a Judge of Probate who was nominated June 14th will go into office."

From your inquiry, I presume the person who was nominated June 14, 1938, was running for the unexpired term as the vacancy, which was filled by the Governor, occurred more than six months before a general election.

Therefore, in answer to your inquiry, it is my opinion that the person nominated June 14, 1938, (and who, I assume will be elected in the general election in November, 1938) will take office immediately after being elected and qualified. This proposition is governed specifically by Section 158 of the Constitution of 1901, which is as follows:

"Section 158. Vacancies in the office of any of the justices of the supreme court or judges who hold office by election, or chancellors of this state, shall be filled by appointment by the governor. The appointee shall hold his office until the next general election for any state officer held at least six months after the vacancy occurs, and until his successor is elected and qualified; the successor chosen at such election shall hold office for the unexpired term and until his successor is elected and qualified."

Said section specifically terminates the tenure of office of the appointee (appointed by the Governor) filling the vacancy as soon as the successor (elected at the general election) is elected and qualified. See *State vs. Rice*, 230 Ala. 608, 162 So. 292; *Prowell vs. State*, 142 Ala. 80, 39 So. 164.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 14, 1938

Hon. J. H. Williams,
Superintendent of Banks,
Capitol.

Banks and Banking —

Under the provisions of Section 6339, Code of Alabama, 1923, a state bank may make additional loans to same party of over twenty percent of its capital, surplus and undivided profits (where the original loan is twenty percent of its capital stock), if such additional loan is properly secured as provided therein. The type of security required of said additional loan applies only to the additional loan and not to both the additional loan and the original loan.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of June 29, 1938, which is as follows:

"One of the banks under our supervision having a Capital, Surplus and Undivided Profit Account of \$85,000 has approved a line of credit of \$17,000 to one of its advance merchant customers. The loan is secured by current bills receivable consisting of advances to its customers, most of whom are farmers. The loan appears adequately secured, as current receivables in the sum of approximately \$34,000 or two for one has been pledged. The amount of this loan is the maximum for a bank of this size with the type of security offered, being 20% of its Capital Structure.

"The same borrower has asked for a line of credit of \$21,300 to be secured by warehouse receipts for 600 bales of cotton which at the present time has a market value of approximately \$27,000. There is an impression that a State Bank can lend a sum equal to 20% of its Capital, Surplus and Undivided Profits when secured by satisfactory receivables and to make additional loans for an unlimited amount when secured by specific pledge of warehouse receipts for cotton or other commodities or type of security coming within the provisions of Section 6339 when not more than 80% of the market value of such commodity is loaned.

"As a construction of Section 6339 of the Code of Alabama, your opinion is desired as follows:

"(1) Can a State bank organized under the laws of Alabama legally lend an amount in excess of 20% of its Capital, Surplus and Undivided Profits to any person, firm (including the several members thereof), or corporation unless the entire amount of both loans are secured by warehouse receipts for cotton or other commodities or securities coming within the provisions of Section 6339; or in other words can a bank organized under the laws of the State of Alabama legally make a loan equal to 20% of its Capital, Surplus and Undivided Profits when secured by bills receivables or other satisfactory security, and make further or additional loans to such borrower, when that portion of the loan in excess of 20% of its Capital, Surplus and Undivided Profits, is secured by commodities or other type of security coming within the provisions of said Section?"

I am of the opinion that your inquiry should be answered in the affirmative.

Section 6339 of the Code of Alabama, 1923, provides as follows:

"Section 6339. LOAN NOT TO EXCEED TWENTY PER CENT OF CAPITAL, SURPLUS AND UNDIVIDED PROFITS. — No bank shall lend to any one person, firm or corporation (including loans to a firm, loans to the several members thereof) more than twenty per cent of its capital, unimpaired surplus and undivided profits; and, where any loan exceeds ten per cent of the capital, unimpaired surplus and undivided profits, such excess shall be secured by good collateral or other ample security; but a bank may buy from or discount

for any person, firm or corporation, bills of exchange drawn in good faith against actually existing values, commercial or business paper actually owned by the person negotiating the same, in addition to loans directly made to the person, firm or corporation selling the same, and such excess loans and such purchase or discount if in excess of ten per cent of the capital, unimpaired surplus and undivided profits (in case of a corporation) shall be approved in writing by a majority of the board of directors or the loan committee, or authorized at a meeting of the board of directors or loan committee, evidenced by properly recorded minutes of such meeting, duly signed by the chairman and secretary, and, if not a corporation, same shall be approved in writing by all of its officers. The limit of loans herein fixed shall not apply to bona fide loans made upon the security of agricultural, manufactured, industrial products, live stock or other liquid securities having a market value and for which there is a ready sale in the open market, title to which, by appropriate transfer shall be taken in the name of the bank, where no more than eighty per cent of the market value of such products shall be loaned or advanced thereon. In all such cases a margin of twenty per cent between the amount of the loan and the market value of the products shall at all times be maintained (except where products are intended for immediate shipment); and the limit herein fixed shall not apply to loans fully secured by bonds or certificates of indebtedness of the United States or of this state, or of the several counties, districts or municipalities thereof, which have been duly and regularly validated as provided by law. Liabilities arising to the makers and indorsers of checks, drafts, bills of exchange, received by the bank on deposit, cashed or purchased by it, shall not in any way be considered as borrowed money or loans. It shall be the duty of the superintendent of banks to order any loan in excess of the amount herein fixed reduced to the legal limit, or the excess charged to profit and loss, provided in his opinion such excess is not well secured, and if such reduction shall not be made within thirty days after such notification, to proceed as in other cases provided for violation of the orders of the superintendent." (*Italics supplied*).

The first part of said section has application to loans to the same party not to exceed twenty percent of the capital, surplus and undivided profits of the bank. Such loan is made in accordance with the mandates of the first part of Section 6339, *supra*. The emphasized portion of the above quoted section provides for additional loans of over twenty percent of the capital, surplus and undivided profits to the same party, which are to be secured in the manner therein provided. The type of security required for the additional loan, over and above the original loan of twenty percent of the bank's capital, unimpaired surplus and undivided profits, in my opinion, applies only to said additional loan and not to both the additional and the original loan.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 15, 1938

Hon. A. D. Kirby,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Statutes — Act No. 27, H. 151, approved January 26, 1937 (Local Acts 1936-37, page 19), repealing local act approved August 11, 1927, authorizing Jackson County to levy a three cent gasoline tax, is constitutional and valid.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of recent date which is as follows:

"The County Commissioners Court and myself requested an opinion as to the legality of repealing the local gas act, HB No. 151 by Kirby and O'Neal, approved January 26th, 1937, page 19, Local Acts, 1936-37. After studying this act some I have come to the conclusion, myself, that it is void, and referred the matter to Mr. D. P. Wimberly, county attorney. I am enclosing you his opinion. I would be very glad to have you give a ruling on this local law, and if in your opinion it is void would the original local law, HB 868, approved Aug. 11, 1927, page 185, Local Acts, 1927, still be in effect?"

In answer to your inquiry, I am of the opinion that the local act in question, vis. Act. No. 27, H. 151, approved January 26, 1937, (Local Acts 1936-37, page 19) is constitutional and valid.

The contention is made in the letter attached to your inquiry that the act in question is invalid for the reason that the notice is insufficient and therefore violative of Sections 106 and 107 of the Constitution of 1907.

The notice published in the Jackson County Sentinel, a newspaper published in Jackson County, Alabama, as shown by the House Journal 1936-37, pp. 188-189, is as follows:

"Notice is hereby given that there will be introduced in the coming special session of the Legislature of Alabama a bill repealing a local bill giving the County Commissioners the authority to levy a three-cent per gallon tax on gasoline."

In dealing with the sufficiency of notice to apply for the passage of a local act, our Supreme Court in the case of **Gray vs. Johnson**, 179 So. 221, stated as follows:

"The decided cases plainly state the rules by which the courts are to be guided in the determination of questions of this character. The general rule, as to the constitutionality of statutes, is well understood. The courts seek to sustain, and not strike down, the enactment of a co-ordinate department of the government. All reasonable doubt is resolved in favor of the action of the Legislature. Every legislative act is presumed to be constitutional and every intendment is in favor of its validity. **Tucker v. State**, 231 Ala. 350, 165 So. 249. And these general rules are as applicable to this provision of our

Constitution as to other constitutional limitations upon legislative power. *Byrd v. State*, 212 Ala. 266, 102 So. 223.

"The evil intended to be corrected by section 106 of the Constitution was pointed out in *Wallace v. Board of Revenue*, 140 Ala. 491, 37 So. 321, and its purpose declared to be the prevention of deception of those immediately affected by the local legislation, to the end that they may have a fair opportunity to protest against and oppose its enactment. * * *

"Speaking of this provision of our Constitution, the court, in *Christian v. State*, 171, Ala. 52, 54 So. 1001, 1002, said: 'The Constitution does not proceed upon the theory that all the details of every proposed law should be worked out in advance and without the aid of legislative wisdom. It requires only that the local public shall be advised of the substance of the proposed law, of its characteristic and essential provisions, of its most important features. And this court has so held in a number of cases. Its language has been that the Constitution is complied with if the notice contains a fair compendium or abstract of the act in all its essential features. It has been said that the Constitution does not interfere with the right of the Legislature to shape up and work out the details of local legislation'."

To the like effect are *Shades Valley Land Co. vs. City of Homewood*, 179 So. 815; *Tucker vs. State*, 231 Ala. 350, 165 So. 249; *Fundeburk vs. Oliver*, 224 Ala. 301, 140 So. 370; *Byrd vs. State*, 212 Ala. 266, 102 So. 223; *Miller, Treasurer vs. Griffin*, 171 Ala. 337, 54 So. 650.

Applying the above rules to the instant case, it is clear that the notice in question fully advised the people of Jackson County of the proposed local legislation. The substance of the proposed law was amply stated in the notice. There was only one subject involved, viz., the repeal of the local law authorizing the Commissioners Court of Jackson County to levy a three-cent gasoline tax. The only law authorizing such a levy was the Act approved August 27, 1927 (Local Acts 1927, p. 185). The purpose of the constitutional provisions were satisfied. Knowledge of this proposed law was brought to the people of the county through a medium usually carrying their news of public affairs — a newspaper. *Tucker vs. State*, supra. *Byrd vs. State*, supra.

The further contention is presented in the letter attached to your inquiry that the act in question is void for uncertainty in that the title and body of said act are vague, indefinite and uncertain. In this contention I do not agree. The Act is as follows:

"No. 27)

(H. 151 — Kirby and O'Neal.

AN ACT.

To Repeal An Act that the Legislature of 1927 authorized the County Commissioners Board of Revenue or like governing body of Jackson County, Alabama to levy and collect an excise tax on gasoline, Woco Pep or any substitute thereof not exceeding three cents per gallon, to authorize such, To provide when this Act shall go into effect court of County Commissioners or Board of Revenue or other like governing bodies of said County to provide the machinery for the collection of said tax.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Sec. 1. That an act of the Legislature of Alabama approved August 11, 1927 and the said Act is hereby repealed.

"Sec. 2. This Act shall go into effect on December 31, 1938.

"Approved January 26, 1937."

The Supreme Court will indulge in all presumptions in favor of the validity of an Act. *Wages vs. State*, 225 Ala. 2, 141 So. 707; *Gray vs. Johnson*, supra, *Tucker vs. State*, supra.

If either the title or the body of the above act were considered separately, same would be vague, indefinite and uncertain. Yet, when considered together the legislative intent is clear and apparent. While the title of an act cannot contradict the plain and unambiguous terms in the enacting clause, its recitals are available aids to remove any ambiguity or uncertainty in the enacting clause. The title of an act is a part of the act, made so by Section 45 of the Constitution. In cases of doubt in respect to an ambiguous legislative intent, the preamble of an act must be resorted to to ascertain the intent and resolve the doubt. **To arrive at the intent of the law, the whole act — title and enacting clause — must be read.** *Wages vs. State*, supra.

The premises considered, it is my opinion that the act in question is constitutional and valid. Since this repealing act is valid, the original act (Acts 1927 p. 185) is necessarily repealed and of no force and effect.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 16, 1938

Hon. Cecil Deason, Solicitor,
Jefferson County Court of Misdemeanors,
Birmingham, Alabama.

Civil Service Act (General Acts 1935, p. 691) applicable to all employees of the Jefferson County Court of Misdemeanors and all officers thereof except the Judge and Solicitor.

Opinion by the Attorney General.

Dear Sir:

I have your request for an opinion as follows:

"House Bill 737 on page 691, the General Acts of Alabama 1935 Regular Session, which sets up Civil Service in counties having a population of two hundred thousand or more which was approved on August 28, 1935. As you know this bill only applies to Jefferson County at this time. On page 228 in the Local Acts, Regular Session, 1935, Legislature appears House Bill 725, which was approved on September 7, 1935, and refers to the operation of the Jefferson County Court of Misdemeanors and Felonies.

"Question: Whether or not the employees of the Jefferson County Court of Misdemeanors under House Bill 725 are under the Civil Service Board in this County."

In view of the broad meaning which may be applied to the term "employees of the Jefferson County Court of Misdemeanors," I will answer your question with reference to all employees or appointees of the Court and all officers thereof, including the Judge and Solicitor.

The Civil Service Act was enacted into law August 28, 1935 (General Acts 1935, p. 691). Section 2 of this act provides:

"Section 2. PERSONNEL BOARD CREATED AND THE EXTENT OF ITS AUTHORITY DEFINED. There is hereby created and established, in and for each separate county of the State of Alabama which has a population of two hundred thousand or more people according to the last Federal Census and also for each County of the State of Alabama which shall hereafter come into such population class according to any subsequent Federal Census, a Personnel Board for the government and control by Civil Service rules and regulations and practices hereinafter set out or authorized of all employees and appointees of such counties and the municipalities therein and of each and every appointing authority therein and such Board is now given and vested with such power, authority and jurisdiction. * * *

"Provided, further, that this Act shall in no event be construed to apply to a person engaged in the profession of teaching or in supervising teaching in the public schools nor to officials elected by vote of the people nor to the Judge of any Court, nor to the County Attorney, nor to the Chief of the Fire Department or the Chief of Police of any city nor to the Chief Deputy Sheriff nor to common laborers engaged exclusively in unskilled labor. It is provided further, that where there are two County sites or County Court House sites maintained in one county and a county officer or officers are required to maintain an office in one Court House and a branch or subsidiary office in the other of said Court Houses, the Chief Deputies of all elective officers in charge of such branch office shall be exempt from the provisions of this Act."

The words "Appointing Authority" or "Appointing Power" are defined by Section 1 of the act as:

" 'Appointing Authority,' or 'Appointing Power.' Person, officer, board, council, commission or other body whose lawful jurisdiction or powers are confined wholly or primarily within the territorial limits of such county and who or which possesses final power to appoint persons to services, jobs, offices or positions, the compensation of which is paid in whole or in part from the public funds of such county or from the public funds of a municipality in such county subject to this Act. 'Employee' or 'Appointee.' Persons in the classified service herein set up and appointed by an appointing authority, unless herein specifically excepted."

You will note from these two sections that, subject to certain exceptions hereinafter noted, the act applies to all employees or appointees, appointed by any person, officer, board, council, commission or other body within the county whose compensation is paid in whole or in part from the public funds of the county or from the public funds of a municipality therein. In view of this broad language of the act, in my opinion no valid distinction can be drawn between "employees" of the Court as distinguished from "officers" of the Court.

The act amending the statutes regulating the Jefferson County Court of Misdemeanors was passed subsequent to the Civil Service Act, by a local bill approved September 7, 1935 (Local Acts 1935, page 228). In my opinion, however, this does not prevent the application of the Civil Service Act to the Jefferson County Court of Misdemeanors, a court which was already in operation before the amendatory statute. Section 16 of the Civil Service Act provides as follows:

"Whenever the appointment or employment of new or additional officers or employees of such counties, municipalities, or appointing authorities, therein, is hereafter authorized by law, such officers or employees shall be subject to the provisions hereof and included within the county and municipal civil service unless of a class excepted herein."

This is a clear impression of the legislative intent that all officers and employees of Jefferson County not specifically exempted by the Act, whether then in office or whether employed in an office later provided for, should be subject to the provisions of the Civil Service Law, subject only to the right of the Legislature to specifically provide otherwise. It is therefore my opinion that the fact that the local bill regulating the Jefferson County Court of Misdemeanors was passed subsequent to the Civil Service Act does not prevent the application of the Civil Service Act to the officers and employees of that court.

The pertinent provisions of this local act regulating the Court are as follows:

"Section 9. The Judge of said Jefferson County Court of Misdemeanors shall appoint a clerk for said court who shall hold office as other employees of the county and who shall exercise and perform all the duties and have all the powers conferred and prescribed for the clerk of said court. The clerk, who is hereafter sometimes referred to as chief clerk, shall give bond with surety in the penal sum of Five Thousand (\$5,000.00) Dollars, payable to the State of Alabama and conditioned to faithfully discharge the duties of such office which bond shall be approved by the Judge of Probate of Jefferson County, Alabama, and filed in his office."

"Section 10. The chief clerk for said court shall receive as compensation for his services such sums as the County Commission of said county shall fix, payable in equal monthly installments out of the general funds of Jefferson County, Alabama.

"Section 11. The Judge of said court shall appoint as many clerks or deputies as may be needed or necessary for the proper conduct of the affairs of said office, the number of such clerks or deputies to be fixed as provided by law, and said clerks and deputies shall each receive such compensation as may be fixed by the County Commission of said county by provision of general law.

"Section 18. There is created the office of solicitor for the Jefferson County Court of Misdemeanors. The said solicitor shall be appointed by the Judge of said court to serve as other employees of said court. Such solicitor shall at and during the time of his appointment reside within the said county and be a duly licensed attorney of the State of Alabama. The solicitor shall attend all sessions of said

court and prosecute all misdemeanors and all felonies to be heard on preliminary trial. The compensation of the solicitor shall be fixed by the County Commission of Jefferson County."

You will note that under Section 9, Section 10 and Section 11 of the amended act, provision is made for the appointment of a chief clerk and so many clerks or deputies as might be needed. Each of these clerks or deputies are appointed by an appointing authority or appointing power as defined in the Civil Service Act. The compensation of each of them is paid from the public funds of such county. It is therefore my opinion that the chief clerk and all other clerks or deputies appointed pursuant to the above statute are employees or appointees as defined in the Civil Service Act and are therefore under the provisions of said Civil Service Act.

The next question is as to the Judge of said Jefferson County Court of Misdemeanors. Under the provisions of Section 2 of the Civil Service Act it is expressly provided "that this act shall in no event be construed to apply to * * * the Judge of any court." It is therefore my opinion and I advise you that the Civil Service Act is not applicable to the Judge of the Jefferson County Court of Misdemeanors.

This leaves undetermined only the status of the Solicitor of said Court. This Solicitor is appointed by the Judge, who as stated above is an "appointing authority" or "appointing power", as defined in the Civil Service Act, and since his compensation is paid from public funds, it might be argued that such Solicitor is also under the provisions of the Civil Service Act. For the reasons hereinafter set forth, it is my opinion that the Civil Service Act does not apply to the office of Solicitor of such Court.

In considering this question there are certain rules of statutory construction from which we seek guidance. Construing any statute, we must consider the evils intended to be remedied and the purposes sought to be accomplished. *Richardson Lumber Co. v. Howell*, 219 Ala. 328, 122 So. 343; *Abramson v. Hard*, 229 Ala. 2, 155 So. 590. Statutes should be construed so as to be harmonious with the general policy of the state. *Caylor v. State*, 23 Ala. App. 1, 121 So. 90. If two constructions are open, one of which gives a reasonable result, while the other construction would give an anomalous result, that construction which gives a reasonable result is to be preferred. *Thompson v. State*, 26 Ala. App. 57, 153 So. 469.

In case of conflict, the latest statute, being the latest expression of the legislative will, governs. *State v. Burchfield Bros.*, 211 Ala. 30, 99 So. 198. A special act on a given subject will be considered an exception to the general act which, standing alone, would have included the same subject in conflict with the special act. *City of Birmingham v. Southern Express Co.*, 164 Ala. 529, 51 So. 159. Thus, things specially treated will be considered as exceptions to general provisions. *Herring v. Griffith*, 211 Ala. 225, 100 So. 202.

With these principles in mind, let us examine the statutes in question. The Civil Service Act was plainly designed to prevent or to overthrow the so-called spoils system of political appointments. There are in the Civil Service Act several provisions which would be incompatible with a construction subjecting the office of Solicitor to that act. The office of Solicitor, while not a judicial office, is one affecting the administration of justice, which administration is at once the duty and the power of the Judicial Department.

Under Sections 7 and 8 of the Civil Service Act, the Director of Personnel must classify all positions to be held, provide for regulation and advancement of salary on the basis of efficiency and length of service; must prepare examinations to determine merit, efficiency and fitness of applicants for positions, such examinations to be given after filing of a formal application.

Under Section 15 the Director is required to keep an official roster of all persons holding positions under the provisions of the act. Under Section 19, before the appointing power may make an appointment, the Director of Personnel must determine the need for the position and classify the position and then certify from the eligible list the names and addresses of the three persons standing highest on such eligible list and the appointing power shall fill the position by appointment of one of the persons so certified.

These provisions are clearly not properly applicable to such a semi-judicial position as that of Solicitor. Such a position requires intangible qualities not subject to be measured by a competitive examination and rating. The Civil Service Act is drawn so as to provide for filling vacancies in those positions not requiring a special fitness and positions so that the applicant, on the eligible list is equally qualified to positions no matter in which department of the county or municipal government the vacancy is to be filled. However, a proposed appointee who might make a splendid Solicitor would not properly fill other vacancies appearing on the roster and would therefore be improperly on the eligible list prepared by the Director of Personnel.

Under our essential philosophy of government, the powers of government are divided by the Constitution into three distinct departments, one of which is judicial (Constitution, Section 42).

"The courts established under the mandate of the Constitution are the immediate and effective arms of the department in the administration of justice. Essential to the existence, the dignity and the proper performance of the functions of the courts thus created is the inherent authority over the conduct of the members of the bar. *In re Burton*, 246 Pac. 188; *In re Ole Mosness*, 39 Wis. 509, 20 Am. Rep. 55; *Re Applicants for License to Practice Law*, 55 S. E. 636, 10 L. R. A. (N. S.) 288; *Ex Parte Steckler*, 179 La. 410; *State v. Hacher*, 129 Mo. 271, 31 S. W. 889; *In re Morse*, 126 Atl. 550; *People v. Merchants Protective Corp.*, 209 Pac. 363; *State v. Credit Men's Assn.*, 43 S. W. (2d) 918; 2 Ruling Case Law. 946. They are officers of the court and amenable to its authority, both as to admission to the right to practice law and the exclusion therefrom. *Ex parte Thompson*, 228 Ala. 113, 152 So. 229; *In re Opinion of the Justices*, 180 N. E. 725 (Mass.), 81 A. L. R. 1059; *Ex Parte Wall*, 107 U. S. 265, 27 L. ed. 552." Quarterly Reports of the Attorney General, Vol. 5, p. 114.

The Solicitor is not only a member of the Bar before the Court but is even more an officer of the Court. I may note that Section 167 of the Constitution, regulating the qualification of solicitors in general, is included in the Constitution under the subdivision "Judicial Department." For these reasons, a holding that the Solicitor of any court is subject to the Civil Service Act is an unreasonable one.

I believe there are further sound legal reasons for holding that the office of Solicitor is not subject to the Civil Service Act. The act amend-

ing the Jefferson County Court of Misdemeanors Act was approved on September 7, 1935, and is therefore a later enactment than the Civil Service Act. While it is true that under Section 16 of the Civil Service Act, such act applies to positions subsequently authorized, it is clear that the Legislature did not intend to bind itself in the future so as to prevent the Legislature from fixing a different, other and further measure of qualification than that included in the Civil Service Act.

In Section 18 of the Jefferson County Court Act, we have such different, other and further qualification, which is incompatible with the application of the Civil Service Act to the office of Solicitor. Up until this amendatory act of 1935, there was no qualification as to the Solicitor of the Jefferson County Court of Misdemeanors other than the general provisions of Section 167 of the Constitution that all solicitors should be "learned in the law." By Section 18 of the 1935 amendatory statute, however, the Legislature added the further qualification that "such solicitor shall at and during the time of his appointment reside within the said county and be a duly licensed attorney of the State of Alabama." This last requirement carries with it the requirement that he shall have passed the Committee on Character and Fitness of the State Bar Commission; that he shall have been either a graduate of the University of Alabama Law School or else that he should have passed an examination by the Board of Bar Examiners (Code of Alabama, Sections 6225, 6226 and 6227), and further that he shall be in good standing in the courts. This is a much higher educational and character requirement than any of the requirements of the Civil Service Act. It is therefore my opinion that since this later specific statute sets a higher standard of qualification for the office of Solicitor of the Jefferson County Court of Misdemeanors, that it was the intention of the Legislature that this last and specific expression should govern and that the office of Solicitor was not to be governed by the provisions of the Civil Service Act.

It is therefore my opinion and I so advise you that all of the employees of the Jefferson County Court of Misdemeanors are subject to the Civil Service Act except the offices of Judge and Solicitor of said Court.

This opinion is substituted for the opinion to Hon. Cecil Deason on this same subject, bearing date of October 26, 1937. The opinion of October 26, 1937, is withdrawn and cancelled.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 16, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Board of Revenue —

1. Board of Revenue of Mobile County has the authority to pay the traveling expenses of the juvenile judge and juvenile county workers to a conference of juvenile workers.

2. Board of Revenue of Mobile County has the authority to furnish a telephone to the solicitor where his office is in the courthouse or is rented for him by the county.

3. Board of Revenue of Mobile County has the authority to furnish and maintain for members of the board, an automobile to be used in the performance of their official duties as limited by Local Acts 1911, p. 289.

4. Where the county attorney is on a salary and is called upon to represent the county in a litigation, the authority of the Board of Revenue to pay the said county attorney additional fees will depend on the contract or retainer.

5. Board of Revenue of Mobile County has no authority to hire or appoint a purchasing agent.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date wherein you request my opinion on the following:

"1. Has the Board of Revenue of Mobile County authority to pay traveling expenses of the Juvenile Judge and Juvenile County workers to a conference of Juvenile workers?

"2. Has the Board of Revenue of Mobile County authority to furnish telephones to the State Solicitor?

"3. Has the Board of Revenue authority to furnish and maintain for members or any one member of the Board of Revenue an automobile to perform their official duties in?

"4. Where the County Attorney is on a salary has the Board of Revenue authority to pay said Attorney additional fees for any litigations that might affect the county?

"5. Has the Board of Revenue authority to hire or appoint a purchasing agent?"

1. Your first inquiry should be answered in the affirmative. The statutes under which the Juvenile Court of Mobile County was organized and operates (Gen. Acts, 1927, p. 653; Gen. Acts, 1931, p. 224; Gen. Acts, 1933, extra session, p. 131) provide that the county in which such court is situated shall pay all items of expense arising out of the operation and in connection with the Juvenile Court. This office has ruled in an opinion to Hon. J. A. Keller, Superintendent of Education, under date of November 1, 1937, (Quarterly Report of Attorney General, Vol. IX, p. 57) that the County Board of Education was authorized to pay the actual and necessary expenses of teachers sent to Peabody College for the purpose of receiving instruction and advice on solving certain educational problems. I believe that the reasoning used in this opinion applies with equal force to this situation and that the traveling expenses of the juvenile judge and the juvenile county workers to a conference of juvenile workers is an item of expense in connection with the operation of the juvenile court and for the better administration thereof and as such is a proper charge.

2. By laws of 1933, Act 187, p. 201, it is provided,

"That Boards of Revenue or Courts of County Commissioners may designate which offices in the courthouse may have telephones installed therein."

This has been interpreted (See opinions of Attorney General, Quarterly Report, Vol. II, p. 64) that where a solicitor has an office maintained for him in the courthouse, the Board of Revenue may furnish him with a telephone. This does not mean that where a solicitor maintains his private law office and at the same time acts as solicitor for the county that the Board of Revenue has the authority to furnish him a telephone in his office. It is my opinion that if the Board of Revenue rents office space for the solicitor outside of the courthouse because of the crowded conditions therein, they would have the authority to furnish him with a telephone at the expense of the county.

3. Your third inquiry should be answered in the affirmative within limitations of Acts 1911, p. 289. By Local Acts of 1911, p. 289 at p. 292 it is provided in part,

"Said board shall have authority to purchase or hire teams or conveyances necessary for such inspection, the reasonable expense thereof to be paid by the county."

This refers to inspections of the roads by the Board of Revenue, but it is limited by a second provision that the President of the Board of Revenue shall direct the inspections to be made in writing by the members of the board and that this should be entered at length upon the minutes of the board. So that in my opinion the Board of Revenue of Mobile County has the authority to furnish and maintain automobiles to be used by the members thereof in the performance of their official duties in inspecting the roads and highways of the county as limited by the above act.

4. In answer to your inquiry referring to the county attorney, I can find no local act or general law with local application in reference to this matter. It is, therefore, my opinion that this question depends on the contract between the Attorney and the Board of Revenue. If the agreement retaining the county attorney requires him to represent the county in any litigations that might affect the county, it is my opinion that he would not be entitled to any additional fees. On the other hand, if the contract does not require him to represent the county in all litigation but only special litigation, there would be no bar preventing the Board of Revenue from paying the said county attorney additional fees for litigation not covered by the contract.

5. Your fifth inquiry should be answered in the negative. Boards of Revenue, Courts of County Commissioners or other like governing bodies of the various counties are purely creatures of statute and have no inherent or constitutional powers. They have, therefore, only such power as is delegated to them by the legislature. *Bice vs. Foshee*, 97 So. 764. Generally, Boards of Revenue have no authority to appoint a purchasing agent. (See opinion of Attorney General, Biennial Report, 1932-34, p. 76, also Vol. 9, p. 106). Further, I have examined the Local Acts establishing the Board of Revenue for Mobile County and do not find any expressed authority in those acts for the Board of Revenue to appoint a purchasing agent.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 16, 1938

Hon. Charles W. Lee,
State Comptroller,
Capitol.

Municipal Corporations — The word "cities" as used in Schedule 158.12 (d) of Section 348 of the Revenue Act of 1935, includes all incorporated municipalities.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of September 24, 1937, which is as follows:

"Schedule 158.12 of the Revenue Code of 1935, among other things, provides that: 'The Tax Assessors and Tax Collectors of the several Counties of this State, in addition to assessing and collecting ad valorem taxes due the State and Counties on motor vehicles, shall collect the ad valorem taxes on motor vehicles due all cities in this State.'

"Section 1743 of the Code of 1923 says among other things that: 'Municipal corporations now existing, or hereafter organized under this chapter, containing two thousand or more inhabitants, shall be called cities.'

"You also referred to Attorney General's opinion on page 308 Biennial Reports 1926-1928. The conclusion in this opinion is directly opposite to the line of reasoning used and its meaning consequently not clear.

"Shall the word 'cities' as used in Schedule 158.12 of the Revenue Code of 1935 be construed to mean municipal corporations of two thousand or more inhabitants or shall it mean all municipal corporations?"

In my opinion the word "cities" as used in Schedule 158.12 (d) of Section 348 of the Revenue Act of 1935, includes all incorporated municipalities.

Schedule 158.12 (d) of Section 348 of the Revenue Act of 1935, provides as follows:

"(d) The tax assessors and tax collectors of the several counties in this State, in addition to assessing and collecting the ad valorem taxes due the State and counties on motor vehicles, shall collect the ad valorem taxes on motor vehicles due on all cities in this State. The tax collector shall report and pay over the money collected for said cities at the same time and in the same manner as State and county taxes are reported and paid over by him. Said assessors and collectors shall each receive a commission of two and one-half per cent (2½%) of the amount of city taxes collected; and the tax collector shall deduct said commission from the amount collected before paying the City Treasury, and at the time pay over to the tax assessor commissions due him under this Act. The judge of probate shall not issue a license to operate a motor vehicle on the highways

of this State until all ad valorem taxes due the said State, counties and cities are paid for the preceding year as shown by a receipt of the tax collector." (Italics supplied).

Section 1743 of the Code of Alabama, 1923, classifies municipal corporations as cities and towns. Cities contain 2000 or more inhabitants and towns more than 100 and less than 2000 inhabitants.

The use of the word "cities" as used in Schedule 158.12 (d) supra, imports all municipal corporations. The word is used in its broadest sense. — See *Mitchell v. Franklin County Treasurer*, 25 Ohio St. 143; *Jackson v. Kansas City, etc. R. Co.*, 157 Mo. 612, 58 S. W. 32; *Noble v. State*, 112 Tex. Cr. R. 676, 18 S. W. (2d) 619. Schedule 158.12 provides for the method of collecting ad valorem taxes on motor vehicles. The license tag cannot be issued until ad valorem taxes have been paid. In order to simplify the procedure the Legislature provided for the assessment and collection of ad valorem taxes on such motor vehicles by the tax assessors and collectors respectively. This certainly implies all ad valorem taxes due; viz., State, county and municipal. Therefore, in my opinion, the word "cities" as used in Schedule 158.12 (d), supra, includes all incorporated municipalities; viz., both cities and towns as classified in Section 1734 of the Code of 1923, supra. To hold that such term was used in its restricted sense and applied only to cities, as therein classified, would vitiate the legislative intent to simplify the procedure for collecting ad valorem taxes on motor vehicles.

The above is in accordance with the holding of the opinion found in Biennial Report of Attorney General, 1926-28, p. 308, to which you refer.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 18, 1938

Hon. E. A. Kimbrough,
Sheriff, Russell County,
Seale, Alabama.

Costs of fee book and sale book for use of Sheriff to be paid for by the county.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of July, 18, 1938, which is as follows:

"In accordance with instructions received from a member of the State Comptroller's Department, I have purchased a fee book and a sale book. I was instructed by the assistant examiner of accounts to the effect that it was compulsory for me to have these books in my office.

"I respectfully request your opinion as to whether or not the costs of these books are a legal charge against the funds of Russell County."

Section 7266, Code of Alabama 1923, requires the sheriff of each county to keep a fee book, in which he must enter, in the form of a regular account opened for that purpose, every fee charged by him for every distinct service rendered by him. Said Section 7266 is in words and figures as follows:

"7266. Clerks, registers, and sheriffs keep fee books. — The clerks of the circuit courts, registers and sheriff, must keep a fee book, which, in the case of the clerk and register, is a book belonging to the office. Each such officer must enter therein, in the form of a regular account opened for that purpose, every fee charged by him for every distinct service rendered by him. The fee book must have an index pointing out the folio of the respective accounts."

Section 10202, Code of Alabama 1923, requires the sheriff of each county to keep a sale book, in which costs be entered on the property sold by him. Said Section 10202 in words and figures as follows:

"10202. Sale book; what to show. — He must keep a sale book, in which he must enter all the property sold by him under any process from any court, a brief description of such process, when the property was sold, the purchaser, and at what price."

I am of the opinion that the costs of these books must be borne by the county and should be paid for by the county.

I refer you to Section 10205, Code of Alabama 1923, which provides for the payment of such by the county. Said Section 10205 is in words and figures as follows:

"10205. Stationery to be paid for by county. — The court of county commissioners must furnish books and stationery to the sheriff for official use, in the same manner that books and stationery are furnished to the clerk of the circuit court."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 19, 1938

Hon. Richard C. Foster, President,
University of Alabama,
University, Alabama.

Board of Trustees of the University of Alabama may legally delegate to the President of the University of Alabama, the authority to act for the Board of Trustees of the University in all matters incident to negotiations between the Public Works Administration of the United States Government or other Federal agencies and the University of Alabama, relative to the securing of funds with which to build certain structures for the University of Alabama.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

This is to acknowledge receipt of your letter of July 13, 1938, together with an enclosed copy of a resolution adopted by the Board of Trustees of the

University of Alabama, on May 23, 1938. In your letter, you ask my opinion on the following question:

"Has the Board of Trustees of the University of Alabama, the authority to authorize, empower and direct the President of the University of Alabama to do the things severally set forth in Sections A, B, C, D, E, F, and G of the Resolution introduced by Trustee Hill Ferguson, and seconded by Trustee Louis L. Herzberg, and unanimously adopted by the Board as set forth in the copy attached hereto (being the first of the two resolutions shown in the attached paper), and may the President of the University acting in pursuance of such resolution lawfully do those things for and in the name of the Board of Trustees of the University of Alabama?

Sections A, B, C, D, E, F and G of the Resolution referred to by you in your letter are as follows:

"A. To execute for and in the name of The Board of Trustees of the University of Alabama any application and/or applications, acceptances, contracts or agreements with the United States of America (or its proper officials) which cover any project for the construction, furnishing and equipping of a library, an auditorium, classroom and music and fine arts buildings, boys' dormitories, additions to heating plant, additions to education, law, commerce, engineering, chemistry, and girls' gymnasium buildings, and additions to the Medical School, and the construction, repairs, alteration, furnishing, and equipping of any other buildings or structures, and the loan and/or grant of money by the United States of America for the same, or which cover any and/or all other joint operations between the United States of America and the University of Alabama, the authority here granted to the said Richard C. Foster, as such President, (or to such other person as may be acting as such President) to include the full right, authority and power, to so execute any and/or all contracts, documents, papers, receipts, or other written instruments connected in any wise with any such projects, buildings, and/or structures (or the application for, acceptance, contract and/or contracts relating thereto) which may be necessary, or which may be required by the said United States of America, or any agency or bureau thereof, or its proper officials, or by the Federal Emergency Administration of Public Works or its proper officials.

"B. To pre-qualify contractors and sub-contractors for work on any and all of the buildings and structures or the furnishing and equipping of the buildings and structures listed above and any other buildings and structures that may be constructed, repaired or altered.

C. To transfer monies from the funds of the University into special building accounts or other accounts as required by the Federal Emergency Administration of Public Works or its proper officials, or its successor or successors.

"D. To select and to employ architects, engineers, inspectors, and any legal and clerical help necessary for the construction, the furnishing and the equipping of the buildings and structures listed above and any other buildings and structures that may be constructed, repaired, or altered.

"E. To establish and to set wage rates for the payment of all labor for the construction, furnishing and equipping of the buildings and structures listed above and any other buildings and structures that may be constructed, repaired, or altered.

"F. To advertise for bids for the construction, furnishing, and equipping of the buildings and structures listed above and any other buildings and structures that may be constructed, repaired or altered.

"G. To enter into a contract or contracts with the contractor or contractors approved by the Public Works Administration for the construction, furnishing, and equipping of the buildings and structures listed above and any other buildings and structures that may be constructed, repaired or altered."

I am of the opinion that the Board of Trustees of the University of Alabama, can legally delegate to the President of the University, the power and authority to do all the things set forth in the aforementioned resolution.

It is my judgment that an opinion rendered to you on January 30, 1937, answers your inquiry.

I am of the opinion that the President of the University, acting in pursuance of such resolution, may lawfully do these things authorized therein for and in the name of the Board of Trustees of the University of Alabama.

Section 264 of the Constitution of Alabama provides for the management and control of the University of Alabama by a Board of Trustees. Said section is as follows:

"Section 264. The state university shall be under the management and control of a board of trustees, which shall consist of two members from the congressional district in which the university is located, one from each of the other congressional districts in the state, the superintendent of education, and the governor, who shall be ex officio president of the board. The members of the board of trustees as now constituted shall hold office until their respective terms expire under existing law, and until their successors shall be elected and confirmed as hereinafter required. Successors to those trustees whose terms expire in nineteen hundred and two shall hold office until nineteen hundred and seven, successors to those trustees whose terms expire in nineteen hundred and four shall hold office until nineteen hundred and eleven; successors to those trustees whose terms expire in nineteen hundred and six shall hold office until nineteen hundred and fifteen; and thereafter their successors shall hold office for a term of twelve years. When the term of any member of such board shall expire, the remaining members of the board shall, by secret ballot, elect his successor; provided, that any trustee so elected shall hold office from the date of his election until his confirmation or rejection by the senate, and, if confirmed, until the expiration of the term for which he was elected, and until his successor is elected. At every meeting of the legislature, the superintendent of education shall certify to the senate the names of all who shall have been so elected since the last session of the legislature, and the senate shall confirm or reject them, as it shall determine is for the best interest of the university. If it reject the names of any

members, it shall thereupon elect trustees in the stead of those rejected. In case of a vacancy on said board by death or resignation of a member, or from any cause other than the expiration of his term of office, the board shall elect his successor, who shall hold office until the next session of the legislature. No trustee shall receive any pay or emolument other than his actual expenses incurred in the discharge of his duties as such."

There is no statutory enactment clearly defining the exact duties and authority of the President of the University of Alabama.

Section 549 of the Alabama Code of 1927, effective as of October 1, 1927, is in words and figures as follows:

"Section 549. APPOINTMENT OF FACULTY. — The Board of Trustees have the power to organize the University by appointing a corps of instructors, who shall be styled the faculty of the University, and such other officers as the interest of the University may require; to remove such instructors or officers, and to fix their salaries of compensation, and increase or reduce the same at their discretion; to institute, regulate, alter, or modify the government of the University, as they may deem advisable; to prescribe courses of instruction, rates of tuition, price of board, and regulate the necessary expenses of students; and to confer such degrees as are usually conferred by similar institutions. **They may delegate to the Faculty of the University or other officers, such powers and functions in the government of the students, and in the administration of the affairs of the University, as they may deem proper;** but in no case shall any person be authorized to receive, hold or disburse any funds of the University without having first given bond, conditioned for the faithful discharge of his duties; and no person shall be excluded from the full benefit of the University Fund, or placed at any disadvantage in the pursuit of his studies, who possesses the requisite literary or other qualifications, and is willing to submit to the discipline prescribed for the students." (*Italics supplied*).

The part of the above section which is underscored has not been changed by the Legislature of this State since it was originally enacted into law by Act No. 135, approved March 1, 1876, (*Acts of Alabama, 1875-1876, p. 268*). In fact it has been readopted by various Legislatures since the time of its original adoption.

The Board of Trustees of the University of Alabama is required by law to meet once each year although there is a provision made for calling special meetings. It is a matter of record, however, that the Board of Trustees of the University of Alabama never meets more than twice in any one year. This is due partially to the fact that the Board is composed of members who are necessarily selected from the several Congressional Districts of the State, and, therefore, their respective homes are many miles distant from the places where meetings of the Board of Trustees may be held.

As the said Board meets only occasionally, and special meetings are extremely difficult to arrange, it has been the continuous practice over a long period of years, in fact every since the passage of the 1876 Act, *supra*, for the Board of Trustees to delegate to the President of the University authority and powers practically unlimited in their scope. This practice has gone on continuously, and many Legislatures have assembled, charged with

the knowledge of this practice, but have never adopted any legislation which would prevent the Board of Trustees of the University of Alabama from delegating such authority, but to the contrary by re-enacting into Law the provisions of the 1876 Act, *supra*, have placed their stamp of approval upon such practice.

Even if it could be admitted that the part of Section 549, *supra*, dealing with the delegation of powers and functions to the faculty and officers of the University, is ambiguous, that it does not clearly enumerate the powers and functions to be delegated, I am constrained to the conclusion that the Legislature, by its acquiescence in and re-adoption of the **fore-mentioned provision**, knowing full well that it was construed by the Board of Trustees to give them authority to delegate to the President of the University such authority as they deemed advisable, is tantamount to an express legislative authority for such delegation.

The rule is stated in 59 Corpus Juris, p. 1025, as follows:

"The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled to more or less weight, especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for a long period of time, and while not generally controlling, where the case is not extreme and no vested rights are involved, such construction should not be disregarded or overturned except for the most cogent reasons, and unless clearly erroneous. * * * In some cases the court has treated contemporaneous and long-followed construction of an ambiguous statute by executive officers or departments as controlling, or as having the effect of positive law, especially where vested rights are involved, or where the statute itself directs the executive department to make necessary regulations to carry out its purposes. * * * Executive construction is entitled to additional weight where it has been impliedly indorsed by the legislature, as by the reenactment of the statute, or the passage of a similar one, in the same or substantially the same terms, or by failure of the legislature, with knowledge of such construction, to change the law or adopt admendments urged."

The following Alabama cases enunciate the same principle of law; *State vs. H. M. Hobbie Grocery Company*, 142 So. 46, 225 Ala. 151; *Shepherd vs. Sartain*, 64 So. 57, 64, 185 Ala. 439.

The same rule is laid down in the following cases: *Simmons Company vs. Commissioner of Internal Revenue*, 33 Fed. 2nd. 75, cert. den. 280 U. S. 588; *National Lead Company vs. United States*, 252 U. S. 140.

In my opinion, the language of Section 549, *supra*, expressly authorizes the Trustees of the University of Alabama to delegate to the President of the University, both ministerial and judicial powers and functions. It is to be noted that provision is made for the Board of Trustees to delegate: "Such powers and functions in the government of the students * * * as they deem proper." This authority, in my judgment, would enable the Board of Trustees to delegate to the President of the University of Alabama all ministerial duties connected with the University of Alabama. The Legislature did not stop, however, with the above authority to delegate, but went further and said, "They may delegate * * * such powers and functions in the **administration of the affairs of the University** as they may deem proper." The use of the words "the administration of the affairs of the University," to my mind

clearly evidences an intention on the part of the Legislature to give to the Trustees of the University the authority to delegate any and all duties incident to the operation, maintenance and management of the University of Alabama in addition to those duties of a scholastic nature.

The President of the University of Alabama in order to effectively "administer the affairs" of the University, must perform duties both of a **judicial and administrative nature**. The very matter here under consideration requires the performance of duties by some part of the University of Alabama within the time limits which absolutely destroy the possibility of their performance by a Board which meets only once a year. The Legislature realized that from time to time duties would be exacted of the Board of Trustees that would be impossible of performance unless the said Board delegated authority to the President to act in matters of a judicial as well as ministerial nature.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 19, 1938

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

County Boards of Public Welfare —

Traveling Expenses of Members —

County governing body may establish any reasonable basis for the determination of traveling and other expenses allowable to members of the County Boards of Public Welfare, while in attendance upon sessions of said board.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I notice that the Act providing for the Boards of Public Welfare (Acts of 1935, page 762) provides that 'Members of County Boards shall serve without compensation for their services as members, but shall be reimbursed out of the general funds of the County for the amount of traveling and other expenses actually paid out while in attendance at the meeting of the County Board.'

"Some of the members of the Board live on the railroad or on bus routes, and if they come to town, either on the railroad or on the bus route, their actual expenses can be readily ascertained. Other members live out in the country and do not have either a railroad or a bus route available for traveling, and there is no way of ascertaining their actual traveling expenses.

"Please advise me what ruling, if any, your Department has made on the question of determining the amount of traveling expenses the members of the Board are entitled to in the case mentioned. Also please advise if there is any other Act providing for the expenses of

the members of the Board to be paid from any fund other than the general fund.

"If no opinion has been rendered on this question, please let me have an opinion at your early convenience, because I have claims pending in Commissioners' Court which should be determined and paid."

No opinion has emanated from this office directly answering your inquiry. In my opinion, any reasonable basis for determining the expenses of members of the County Board of Public Welfare may be employed by the county governing body. It may suggest itself to the Commissioners' Court that a stipulated sum per mile by the usually traveled route in going to and returning from the places where the board sessions are held, together with a fixed allowance per diem for the meals and other expenses of the attendance of said sessions, is an equitable and fair basis for determining the proper reimbursement to be made. So long as the method employed is reasonable, it is my judgment that the county governing body is acting within its express or implied authority and power.

Answering your second inquiry, you are advised that the Public Welfare Act of 1935, cited in your request, is the only authority for the payment of expenses of members of County Boards of Public Welfare. Cf. *Quarterly Reports of Attorney General, Vol. II, p. 240.*

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 19, 1938

Hon. Wm. F. Maynor,
Superintendent of Education,
Blount County,
Oneonta, Alabama.

Schools — County Superintendent of Education or member of County Board of Education cannot contract with said Board of Education for the sale of materials and supplies, as such a contract would be contrary to public policy.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of June 27, 1938, in which you request my opinion as follows:

"Would a county superintendent or a member of the county board of education be allowed to sell school furnishings for buildings or equipment or to sell coal to the schools of the county for heating purposes or to sell any building material whatever including windows, doors, nails, etc. In other words, would the county superintendent or any member of the local school board be allowed to sell anything to anybody connected with the school business or otherwise through his official position for profit."

I am of the opinion that your inquiry should be answered in the negative, as such contracts would be contrary to public policy.

Section 5024, Code of Alabama 1923, as amended (General Acts 1936-1937, page 225) has no application to the instant case, as same is applicable only to contracts with the county. A county board of education is not part of the county, but is a quasi corporation and independent agency of the state. — *State v. Tuscaloosa County*, 233 Ala. 611, 172 So. 892; *Kimmons v. Jefferson County Board of Education*, 204 Ala. 384, 85 So. 774. There is no direct prohibition in the School Code of 1927 relative to a county superintendent of education or a member of the county board of education contracting for the sale of supplies or material to said county board of education. Section 87 thereof provides that no member of the county board of education shall be an employee of said board, but makes no reference to contracts for supplies or materials.

Since there is no statutory prohibition against contracts of the nature of those set out in your inquiry, it is necessary then to determine whether such would be contrary to public policy. In my opinion this query should be answered in the affirmative.

56 C. J. 485, Section 515, in dealing with the specific matter under consideration, provides as follows:

"Section 515. Personal Interest of Officers. In some jurisdictions statutes provide that a member of a school board or a school officer cannot on behalf of the school district or other local school organization enter into a contract in which he has an individual interest, and that in such a case the contract is void. Aside from express statutory enactment, such a contract is against public policy, and in some jurisdictions it is held that a contract so entered into is void, but in other jurisdictions such contracts are merely voidable, and are binding when properly ratified."

24 R. C. L. 579, Section 28, provides in part as follows:

"28. Contracts between Director and District. The relation of a director to the school district is of a confidential and fiduciary nature. The director represents the school district, and is its agent, and on this account, he cannot place himself in a position where his own personal interests might conflict with those of the school district which he must represent. As a general rule therefore it is unlawful for a director to enter into a contract with the school district in which he has a personal and individual interest, or to continue after election as a director in a contract relation previously assumed, and a contract so made by a director will not be enforceable. This is true even in the absence of a statute to this effect, though in some instances statutes have been enacted either abolishing or limiting and regulating the right to contract in such cases. * * *"

46 C. J. 1037, Section 308, provides as follows:

"Section 308. Individual or Personal Interest in Transactions — a. In General. A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit; and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Thus public officers are denied the right to make contracts in their official capacity with themselves, or to become in-

terested in contracts thus made, or to take contracts which it is their official business to see faithfully performed; and a board cannot make a legal contract with one of its own members in respect of the trust reposed in it. * * * "

See also *McGehee v. Lindsay*, 6 Ala. 16; *State v. Castleberry*, 23 Ala. 85; *Maddox v. Fuller*, 173 So. 12.

In view of the principles above set out, it is my opinion that a county superintendent of education or a member of a county board of education cannot contract with said board of education for the sale of supplies and materials. Such a contract would be contrary to public policy.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 19, 1938

Hon. John Brandon,
State Treasurer,
Capitol.

Pension Warrants — State Treasurer has no authority to pay pension warrant drawn October 1, 1921, presented for payment in May, 1938, by an endorsee, as payee's signature was not properly attested in writing, and said warrant is now barred by the statute of limitations.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your inquiry, in which you state:

"The enclosed pension warrant in the sum of \$16.00 dated October 1, 1921, issued to Mrs. Mary A. Lawrence has been presented to this office for payment.

"All information in reference to endorsement that I have is written on the back of this warrant."

You wish my opinion if this warrant is in order for payment.

In my opinion your question should be answered in the negative. Section 18 of Act No. 409, S. 12, approved September 23, 1919, General Acts 1919, p. 535, provides in part as follows:

" * * * Each warrant before being paid must bear the endorsement of the payee attested by some witness in writing and where payee is unable to write such endorsement shall be attested by two witnesses in writing."

From an examination of the warrant, it is obvious that the section, supra, has not been complied with, as the payee's endorsement has never been attested to in writing. Therefore, you do not have authority to pay said warrant.

This warrant is really a check drawn by the State Auditor, on the State Treasurer, and should have been presented for payment within a reasonable time. — **Brannan's Negotiable Instruments Law, Sixth Edition**, p. 1146, and cases cited therein. This warrant was not presented for over sixteen years from the date it was drawn, therefore, it is my opinion that the State is under no legal obligation to pay the same, as it is now barred by the statute of limitations.

Section 8944 of the 1923 Code of Alabama provides in part as follows:

"Section 8944. Limitation of six years — within six years. —
* * *

4. Actions founded on promises in writing not under seal."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 19, 1938

Dr. Richard C. Foster, President,
University of Alabama,
University, Alabama.

A special meeting of the Board of Trustees of the University of Alabama, legally called, may be lawfully held even though it comes between a regular meeting of the Board of Trustees and an adjourned regular meeting of that Board.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

This is to acknowledge receipt of your letter of July 13, 1938, wherein you request my opinion as to whether or not the Board of Trustees of the University of Alabama may legally hold a special meeting upon proper call between adjourned meetings of the regular annual meeting of said Board.

I am of the opinion that your question should be answered in the affirmative. I refer you to the provisions of Section 552, of the School Code of 1927.

It is my judgment that a special meeting of the Board of Trustees of the University of Alabama may be lawfully held at any time regardless of the fact that such special meeting may fall upon a date between the regular annual meeting of the Board of Trustees and the date set for an adjourned meeting of the said annual meeting.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 19, 1938

Dr. Richard C. Foster, President,
University of Alabama,
University, Alabama.

An adjourned meeting of the Board of Trustees of the University of Alabama may be recessed from one date to another because of the lack of a quorum or for any cause deemed wise.

At such adjourned meeting, the Board of Trustees of the University of Alabama may lawfully transact any business relating to the affairs of the University of Alabama.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

This is to acknowledge receipt of your letter of July 13, 1938, wherein you request my opinion on the following question:

"May the Board of Trustees in the regular annual meeting assembled at the University on May 23, 1938, at such meeting recess to meet again in an adjourned meeting in the office of the Governor at Montgomery, Alabama, on June 17, 1938, and at such adjourned meeting for lack of a quorum or for any other cause, recess to an adjourned meeting on July 7, 1938, at the same place and upon that date for lack of a quorum or for any other cause recess to an adjourned meeting at the same place on July 28, 1938, and at such adjourned meeting or meetings, or at any subsequent adjourned meeting, transact any business relating to the affairs of the University of Alabama?"

It is my opinion that your question should be answered in the affirmative. I refer you to Section 552 of the Alabama School Code of 1927, which is as follows:

"Section 552. MEETING OF TRUSTEES. — The Board of Trustees shall meet at least once in each year, and on the first Wednesday in June, unless some other day is selected by them, and they may, by ordinance or resolution adopted by them, prescribe other regular times for meeting. At such meeting they may continue in session as long as they may deem proper for the welfare of the institution, and may at any session appoint a special or adjourned meeting. Upon the written application of four members, or of any three members with his concurrence, the president pro tempore shall appoint a special meeting, and issue notice thereof to the several members; but such special meeting shall not be appointed for a day less than twenty days subsequent to the date of the notice. In case there is no president pro tempore of the Board, or in case he is incapacitated to act, then the Governor, as President of the board, shall, upon the written application of four members, in like manner call such meeting. Regular meetings of the Board must be held at the University, but special or adjourned meetings may be held at the University or in the City of Montgomery, or in the City of Birmingham.

It is my judgment that the meetings of the Board of Trustees may recess an adjourned meeting from one date to another and that at such adjourned

meetings, may transact any business relating to the affairs of the University of Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 20, 1938

Hon. Whitten Wilbanks,
Tax Collector,
Lauderdale County,
Florence, Alabama.

1. Where property is acquired by the United States Government subsequent to October 1, every effort should be made to collect taxes due, from the grantor of the property.

2. Where the taxes cannot be collected from the grantor, the State has a valid lien for taxes, and may impress such lien upon the land by proper procedure.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion on the following:

"The United States of America by and through its agent, the Tennessee Valley Authority, acquired a tract of land in Lauderdale County by warranty deed on March 19, 1937. To date the 1937 taxes on this land have not been paid. The Tennessee Valley Authority is inclined to the opinion that the United States of America is not liable for the payment of 1937 taxes on the land in question.

"Inasmuch as we are now in process of selling all land on which 1937 taxes are delinquent, I would like to have an opinion from you as to whether or not the subject land should be included in the tax sale and whether or not the present owner, the United States of America, is liable for the payment of taxes."

This office in an opinion to Hon. Joseph B. Crow, under date of June 20, 1934, ruled in a situation similar to yours that the taxes can be collected from the owner of the property on October first of the tax year. The opinion holds further that the tax is a personal obligation on the part of the owner of the property on October first. I am enclosing a copy of this opinion for your information. It is my conclusion, therefore, that every effort must be made to collect this tax from the grantor of the land to the Tennessee Valley Authority.

It is settled that the state and county lien for taxes assessed against property accrues on the first day of October of each year. Section 8874, Code of Alabama, 1923, provides as follows:

"Section 8874. LIEN OF STATE AND COUNTY FOR TAXES.

— From and after the first day of October of each year, the state shall have a prior lien upon each and every piece or parcel of

property, real and personal, for the payment of any and all taxes which may be assessed against the owner, or upon such property, during that year, for the use of the state; and the county shall have a like lien thereon for the payment of the taxes which may be assessed against such owner, or upon such property, during that year, for the use of the county; and these liens shall exist as to all lands bid in by the state at tax sales for the annual taxes thereafter assessed on the value of the property so purchased, in the event of the tax title failing." (*Italics ours*).

This is now settled law in this state. See *Swan & Billups v. State*, 77 Ala. 545; *Rogers v. Gaines*, 73 Ala. 218.

In case it is impossible to collect this tax from the grantor, then I suggest that the most satisfactory method of enforcing the State's right would be by petitioning the Federal Court to impress a lien upon this property. This is apparently the method contemplated in the case of *United States v. Pierce County*, 193 Fed. 529, in a similar matter which arose in the State of Washington.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 20, 1938

Hon. Homer F. Mitchell,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Tax Sales — Notice to non-resident delinquents.

1. The several non-resident delinquent taxpayers against whom assessments for ad valorem taxes are made may be given the notice required by Section 217 of the Revenue Acts of 1935, in one publication.

2. The several resident delinquent ad valorem taxpayers upon whom personal service is not perfected under Section 217 may be given the notice required by Acts 1936, page 216, in one publication.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Section 216 of the 1935 Revenue Act (P. 352, 1935 Acts) provides for the Tax Collector to prepare and deliver to the Probate Judge by the first of March his delinquent Tax Docket containing all real estate on which taxes have not been paid. Section 217 provides for the Probate Judge to issue a notice 'addressed to each person against whom any unpaid taxes are assessed as shown by such book,' and goes on to set out the form of the notice to be issued, and provides for said notice to be served by the Tax Collector. Sub-sections (b) and (c) of Section 217 provide for this notice to be given by publication in certain cases, i. e., to Non-residents, Guardians, Personal rep-

representatives of estates, and to others. Another Act passed April 21, 1936, (P. 216 1936 Acts) provides for the notice to be given by publication where the Tax Collector has failed to serve the notice after two attempts.

"In cases where there a number of persons to whom this notice is to be given by publication, including non-residents, guardians, personal representatives of estates, etc., can this notice be given to all of these parties in the same notice by listing all of the names for whom the notice is intended and showing the amount of taxes due by each and only printing the form of the notice once or is it necessary to have a separate notice printed addressed to each person and print the form of the notice in full after each separate name?

"We are enclosing a copy of this notice filled out so as to better illustrate our question. Please advise us if the notice given in this form meets with the requirements of law so as to support a tax sale. The idea for giving one notice only is to reduce advertising cost."

In my opinion, the several persons against whom any ad valorem taxes are assessed, and who are delinquent in the payment of the same, may be notified by the same publication. The form which you have attached to your request is a substantial compliance with Section 217 of the Revenue Act of 1935.

The Act of 1936, page 216, provides, in substance, that in the event the notice required by Section 217, supra, to be given to delinquent resident taxpayers, remains unserved after two notices to the same taxpayer are returned not served, notice by publication or by posting may be given "as in the case of a non-resident."

In my opinion, publication as to the several delinquent residents upon whom service is not perfected may be made in the same publication.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 20, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Commissioners Court —

1. Members of Court of County Commissioners of Covington County should be paid in accordance with schedule set forth in Section 6771 of the Code of 1923, as amended.

2. Any other payment will render person responsible for making such payment liable.

Opinion by Assistant Attorney General Crittenden

Dear Sir:

I have your letter of recent date which is as follows:

"Please refer to Section 6771, Code of 1923 as amended, Section 6772, Code of 1923, Local Acts 1919 (S. 27 — Prestwood), pages 8-12, cases reported as follows, 218 Ala. 274, 196 Ala. 486 and 171 Ala. 337, and also copy of claim hereto attached and advise me as follows:

"1. Is Section 16 of such Local Act Constitutional?

"2. If such Section is unconstitutional would the president, who signed the warrant, and the member who received such compensation be liable for the gas and oil allowance which is in addition to \$3.00 per day and 5c per mile traveled?

"3. If Section 16 is Constitutional would the Members of the Court be allowed \$3.00 per day, 5c per mile traveled and 2c per mile expense allowance while inspecting, etc., roads and bridges, provided such Court has duly entered an order allowing 2c per mile as expense allowance, or would they only be allowed 2c per mile for expense allowance while inspecting, etc., roads and bridges?

"4. Under Section 16 of such Act regardless of its Constitutionality, would the Members be entitled to \$3.00 per day, 5c per mile traveled and 2c per mile expense allowance while inspecting, etc., roads and bridges or would they only be allowed 2c per mile for expense allowance while inspecting, etc., roads and bridges?

"5. If such Members are only allowed 2c per mile as per resolution of such Court while inspecting, etc., roads and bridges, would the president, who signed the warrant, and the member who received such compensation, namely, \$3.00 per day and 5c per mile, be liable for such amount so paid out?"

I am of the opinion the amounts paid to members of the Court of County Commissioners are governed by Section 6771 of the Code of Alabama of 1923, as amended by Act No. 669, General Acts, 1931, at page 805, as this is a subsequent enactment of the Legislature and is apparently intended to cover the entire subject. *Isbell v. State*, 10 Ala. App. 639, 65 So. 706. *Barnes v. State ex rel Tate*, 26 Ala. App. 450, 162 So. 404; Cert. Den. 230 Ala. 596, 162 So. 406.

Any official who pays an amount different from the schedule set forth in said Section 6771 is liable for such payment as same is contrary to law.

In view of the foregoing, it is unnecessary to pass on the constitutionality of the local act mentioned.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

July 22, 1938

Mobile County —

1. Authority to furnish and maintain for members of the Board of Revenue, an automobile, does not authorize the employment of a chauffeur.

2. A member of the Board of Revenue is furnished with an automobile and gasoline, as limited by Local Acts 1911, p. 289. Entitled to mileage for attending meeting of Board but cannot use county automobile and gasoline for same.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 13, 1937, which is as follows:

"Please advise me if the Mobile County Road Commissioners have authority to employ a chauffeur for the President of said Board.

"Also advise me whether or not the Members of the Board of Revenue and Road Commissioners of Mobile County are entitled to five cents a mile attending a meeting of the Board in cases where the County furnished each Member of the Board with an automobile and gasoline and oil."

Before answering your inquiries specifically, I wish to call your attention to an opinion rendered to the State Comptroller on July 16, 1938, wherein it was held that the Board of Revenue of Mobile County has the authority to furnish and maintain for members of the Board an automobile to be used in the performance of their official duties as limited by Local Acts 1911, p. 289.

I am of the opinion that your first inquiry should be answered in the negative. The authority to furnish and maintain an automobile for members of the Board of Revenue of Mobile County does not, in my opinion, authorize employment of a chauffeur. Such is not a necessary incidental to the maintenance of an automobile.

In answer to your second inquiry, it will be noted that the Board of Revenue has authority to furnish and maintain for members of the Board an automobiles for the performance of their official duties as limited by Local Acts 1911, p. 289. Said Local Act refers only to duties in relation to roads and bridges and makes no reference to the attendance of Board meetings. Also it will be noted that the compensation allowed under said Act is in addition to that received prior to August 2, 1907. The compensation therein referred to was for attending meetings of the Board as provided for in Section 3322 of the Code of 1907, allowing three dollars per day and five cents per mile. Said Section 3322 of the Code of 1907 was carried forward as part of Section 6771 of the Code of 1923, allowing the same compensation for attending commissioners meetings. In Section 6771, Code of Alabama, 1923, there was added the per diem and mileage for road and bridge duties which, of course, has no application to Mobile County as the compensation of Board members for their service is fixed by Local Acts 1911, supra. Therefore, in my opinion, the members of the Board of Revenue would be entitled to mileage for attending meetings of the Board but could not use the county automobile and gasoline for such purpose.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 22, 1938

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

1. Officers of special election called by the Democratic Executive Committee, under the provisions of Section 51 of the 1931 Primary Act, are to be paid as provided by law for the payment of the expenses and officers of general elections held under the general election laws of this state.

2. The election officers who serve at such special elections are to be appointed in accordance with the provisions of Section 13 of the 1931 Primary Act and Section 437, et seq. of the Code of Alabama, 1923.

3. The sepecial election is to be conducted in all manners in accordance with the rules governing the holding of any other primary election.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of June 25, 1938, in which you request my opinion as follows:

"A Democratic Primary was held in Chilton County on the first Tuesday in May, 1938, and a second Primary was held on the second Tuesday in June 1938, to determine the nominee for tax collector, as well as the senatorial nominee, for this district. On the day of the election, the absentee ballot box was taken, by some several citizens of the County, from the polling place, and was not available for the Committee, the Canvassing Board, to canvass on the Thursday following the second Primary. J. R. Hardy, in the absence of this absentee ballot box, received thirty-two votes majority over T. L. McKee, and T. L. McKee filed a contest, and the County Executive Committee then ordered a third Primary to be held July 26, 1938, for a run-off for said office of tax collector, and the State Executive Committee ordered a new Primary, on the same date, for a run-off between the senatorial candidates. I am giving you these facts as a premises and will you please advise me as follows: First, whether or not the expenses of this Primary will be paid in the same manner as expenses of the second Primary, (See Section 7, Acts 1931, page 73). Second, also, advise me if the same election officials shall serve and conduct this third Primary, or if new election officials will have to be appointed. Third, if you know of any differences between the conduct and management of the third Primary and the second, such as preparation of ballots, conduct of absentee ballots, and the general conduct of the election, please advise me."

From the facts set out in your letter, it seems that the special primary election referred to was called pursuant to the provisions of Section 51 of the Primary Election Law of 1931 (General Acts 1931, p 73) which provides:

"Section. 51. If, upon the hearing of any contest for any office, as provided for in this Act, the committee, after an investigation and

hearing of the contest, shall determine that it is impossible from the evidence before it to decide who is the legally nominated candidate for the office contested, it shall have the right and authority to direct a new primary election for the nomination to any such office, but where any action is taken by any county executive committee, either person to the contest, in the same manner as herein provided for in the case of appeals from the action of any County Committee, may take an appeal to the State Executive Committee, which shall be the court of final appeal in all party contests of nominations; provided, that upon hearing of any contest or appeal, as provided for in this act, which is not referred to and decided by a sub-committee fifteen members of any such State Executive Committee shall constitute a quorum for the hearing and determining of such contest, or appeal, provided further, that the entire committee be notified of the meeting in the usual way."

Your first inquiry is as to the expenses of such election. Section 7 of this Act provides:

"Section 7. That the officers and other expenses of any and all primary elections, general or special, held under the provisions of this Act shall be paid for in the same manner and to the same extent as is or may be provided by law for the payment of the expenses and officers of general elections held under the general election laws of Alabama, and to be paid out of the county treasury in the same manner; provided, however, that the cost of such primary elections held for municipalities or for the election of municipal officers or officials shall be paid for out of the treasury of such municipality."

In my opinion, the special primary election referred to in your letter comes within the express language of Section 7 and the expenses should be paid as therein provided. **Biennial Report of the Attorney General, 1932-34, page 380.**

I am of the opinion that your second question should be answered in the negative. I do not find anywhere in the act any provision requiring the election officials who served at the regular primary elections to serve at special elections called by the Democratic Executive Committee in cases growing out of contests or in case of a vacancy. It is my judgment that this election is a separate and distinct primary election, and the officials should be appointed to serve in said election in the same manner as officers were originally appointed to serve in the first primary. There is no more reason for having the officers who served in the regular primaries serve in a special election growing out of a contest than it would be to have them serve in case of a vacancy subsequently occurring. It is my judgment that the election officers should be appointed under the provisions of Section 13 of the 1931 Primary Act (General Acts 1931, page 77) and the provisions of Section 437, et seq., Code of Alabama 1923.

Of course, the officers handling the absentee ballots are appointed under the provisions of an act passed by the 1933 Legislature (General Acts 1933, page 193).

In answer to your third inquiry, I wish to advise that it is my judgment that the special election called by the Democratic Executive Committee should be conducted in all respects as a separate and distinct election and

in accordance with all rules and regulations governing the holding of a regular primary election.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 22, 1938

Hon. Watkins M. Vaughan,
Probate Judge,
Dallas County,
Selma, Alabama.

County Officers — Contracts with County.

Contract entered into between Probate Judge and the Board, provided by Act of 1884-1885, p. 272, whereby Probate Judge agrees to make and keep indexes of public records in his office at a stipulated sum per thousand names per annum listed on said indexes, is illegal and void under Section 5024, Code of Alabama, 1923.

Statutes — Acts of 1884-85, p. 272 not repealed by subsequent laws of general application (Section 7264 of the Code) precluding Probate Judge from receiving a fee or allowance out of County Treasury for keeping direct and reverse indexes to books and records of office. (Subsection 3, Section 9581 of the Code).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I am enclosing you a copy of a contract between a Board created by the Legislature of 1884, and myself, for your opinion as to its legality. The agreement states the facts and same has always been regarded as the law until Mr. Turnipseed, the Examiner, recently requested that I have an opinion from you before collecting this money for this year.

"The Statute (Code Sec. 7264) provides that Probate Judges and other named in said section shall not receive any fees or allowances for making and keeping indexes. In 1884 (Acts 1884-5, p. 272) a Local Act for Dallas County was passed allowing compensation for some one selected by the Board created in said Act in Dallas County."

In my opinion, the contract between yourself and the Board provided by Act of 1884-5, p. 272, whereby you have contracted to make and keep the indexes of the public records of all documents and papers required to be filed for recordation in the Probate Office of Dallas County at a contract price of \$12.00 per thousand names per annum, entered upon said indexes, is illegal and void.

Section 5024 of the Code of Alabama, 1923, provides in part:

"Section 5024. COUNTY OFFICER INTERESTED IN COUNTY CONTRACTS. — Any judge of probate, tax collector, tax assessor,

sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract for work or services of the county, or is employed in any way under such contract, * * * must on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months * * * .”

The contract between yourself and the Board comes within the purview of the cited section. See *Pitts vs. Chilton County*, 173 So. 94, and cases there cited.

However, it is my opinion that the Act of 1884-85, p. 272 is still in full force and effect and that the Board provided thereby may contract with some eligible person to make and keep the indexes to the records of the Probate Office of Dallas County.

At the time of the enactment of the act, supra, Section 695, subdivision 3, of the Code of 1876 provided that it was the duty of the Probate Judges:

“To keep all the books, papers and records belonging to their office, with care and security; the papers arranged, filed and labeled, so as to be of easy reference; and the books and records lettered, and kept with direct and reversed indexes.”

This provision has been carried forward in each succeeding Code and appears in the Code of 1923 as subdivision 3 of Section 9581.

Section 7264 of the Code of 1923 provides:

“NO CHARGE FOR KEEPING INDEXES. — The probate judges, clerks of the circuit courts, and registers are prohibited from receiving any fees or allowances out of the county treasury for keeping direct and reverse indexes to books and records required by law.”

But the sections cited next above are general provisions operating upon a general subject, whereas the 1884-85 Act, supra, is a special provision operating upon a special subject. General enactments do not repeal special enactment although the subject of the special statute is included within the subject of the subsequent general statutes. — *City of Birmingham vs. Southern Express Co.*, 164 Ala. 529, Ala. Digest — Title “Statutes” Key No. 162.

In my opinion, this long established rule of statutory construction is illustrated in its application to the facts appearing in your inquiry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 23, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

1. Publication of financial statements by county governing body of Dallas County governed by provisions of Act No. 208, Local Acts 1907, page 369.
2. Costs of such publication must be paid for in accordance with the terms of the above cited local act.
3. It is not mandatory upon the State Comptroller to furnish a form to be used in publishing such financial statement.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of May 16, 1938, which is as follows:

"Please refer to Acts of 1898-9, as amended by Local Acts 1907, page 369, Code of 1923, as amended Acts 1936-37, page 258 and uniform accounting and reporting act, Acts 1935, page 43 and advise me as follows:

- "1. Should Dallas County publish a financial statement quarterly as per Local Acts or semi-annually as per General Law?
- "2. Should Dallas County pay for publishing such statement as per Local Acts or as per Section 6767, Code of 1923 as amended?
- "3. Should the Comptroller, under Act of 1935, page 43, furnish the County with a form to be used in publishing such statement?

In order to answer your first and second questions, it is necessary that I consider the history of the general legislation requiring publication of financial reports by the various counties in the state, as well as the history of the local legislation affecting Dallas County dealing with such publication.

Section 750 of the Code of Alabama of 1876, provides as follows:

"It shall be the duty of the Court of County Commissioners to make semi-annual publications, on the first day of January and July of each year, showing the receipts and expenditures of money for the county, specifying particularly the sources from which received, and the purposes for which expended."

The same provision is incorporated in Section 830 of the Code of 1886, Section 962 of the Code of 1896, and Section 3317 of the Code of 1907.

Section 3317 of the Code of 1907 was amended prior to the adoption of the 1923 Code, by an act approved September 25, 1915, General Acts 1915, page 823, and by an act approved September 12, 1919, General Acts 1919, page 451.

Section 6766 of the Code of 1923 includes the two above mentioned amendments and is in words and figures as follows:

"The courts of county commissioners, boards of revenue or like governing bodies shall make a semi-annual publication on the first day of January and July of each year, in a newspaper published in the county, of an itemized report, showing the receipts and expenditures of money for the county, specifying particularly the sources from which received, and the purpose for which expended. Said publication must also show the entire indebtedness of the county, of whatever kind and character, specifying particularly the amount of bonds outstanding, their character and when due; the amount of the outstanding warrants, whether interest-bearing or not, and if interest-bearing, the rate of interest, for what said warrants were issued and when due and payable."

Section 2 of the 1915 amendatory act above referred to was codified in the 1923 Code as Section 6767, and is in words and figures as follows:

"If the commissioners' court shall fail to make the said publication as required by the preceding section, each member composing said court who votes against said publication, is made subject to a penalty of Fifty Dollars (\$50.00), to be collected by suit; and the circuit or county solicitor shall bring suit and prosecute the same in the name of the county as plaintiff. The compensation to be paid for the publication herein provided for shall not exceed one hundred dollars in counties of less than forty thousand population, according to the last or any subsequent Federal census."

An Act of the 1927 Legislature, General Acts 1927, p. 691, added the following provision to Section 6766, Code of Alabama 1923, *supra*:

"Provided, however, that in all counties having a population of two hundred thousand or more according to the last or any subsequent Federal census, the report above provided for shall be published annually upon the first day of October of each year."

Act No. 524, approved April 14, 1935, amended Section 6767 of the Code of 1923, which was a part of the 1915 act, *supra*, amending Section 3317, Code of 1907, by changing the limitation as to cost of publication in counties of less than forty thousand population from \$100.00 per report to 1½c per word.

Act No. 216, General Acts 1936-37, p. 258, amends Section 6766, Code of 1923, by changing the dates of the semi-annual publications from January and July to April and October.

The foregoing is a complete history of Section 6766, Code of Alabama 1923, as amended. It undoubtedly applies to Dallas County unless local legislation removes that County from the operation of said act.

Section 4 of an act entitled "An Act to further regulate the financial affairs of Dallas County," approved February 2, 1897, Acts of Alabama 1896-97, p. 492, is in words and figures as follows:

"Section 4. That the Board of Revenue of Dallas County shall hereafter on the first days of January and July, semi-annually publish in some newspaper published in the City of Selma, a full and complete statement of the true status and condition of the financial affairs of said county."

An act approved December 5, 1898, Local Acts 1898-99, p. 42, amended Section 4 of the 1897 act heretofore set out to read as follows:

"Section 4. That the Board of Revenue of Dallas County shall hereafter on the first days of January, April, July and October, quarterly publish in some daily paper, published in the City of Selma, a full, complete and itemized statement of the status and condition of the financial affairs of said county; said statements to show amount of receipts and on what account, as well as each item of disbursement, and to whom and for what purpose disbursed or paid. The cost of said printing shall not exceed one dollar (\$1.00) per inch for each insertion set in nonpareil type."

Section 4 of the 1897 Act was again amended by the Legislature of 1907, Local Acts 1907, page 369, by allowing the publication to be made in a weekly paper as well as in a daily paper.

It might be well to consider both the general acts and the local acts affecting Dallas County in their chronological order. We find that in the Codes of 1876, 1886, and 1896 the general law required the court of county commissioners to make semi-annual publications, showing the receipts and expenditures of money, specifying particularly the sources from which received and the purposes for which expended, these publications to be made on the first days of January and July of each year. This law, insofar as I am able to ascertain, applied to Dallas County as well as to all other counties in the State of Alabama. In 1897, by Local act, the Board of Revenue of Dallas County was required to do practically the same thing that the general law had theretofore required of them. The dates of the publication were the same, namely the first days of January and July of each year. The requirement was made, however, that the publication be made in a newspaper published in the City of Selma, and that the publication be a full and complete statement of the true status and condition of the financial affairs of said county. This act did not materially change the law then applicable to all the counties in the state. However, in the following year this provision of the local law was materially changed, and thereby effected a change from the general law. The 1898 amendment required a quarterly publication rather than a semi-annual publication. It also required as equally a particularized statement as that required by the general law and it further limited the price which could be paid for the publication of said financial reports. The 1907 amendment to the local act affecting Dallas County merely allowed the report to be published in a weekly paper published in the City of Selma as well as in a daily paper published therein.

Section 3317 of the Code of 1907, adopted after the passage of all the local legislation affecting Dallas County, is in the exact language which has been in the Codes of 1876, 1886 and 1896.

There has been no amendment to Section 4 of the 1907 Local Act, *supra*. We have heretofore discussed the amendments to Section 3317 of the Code of 1907 and to Section 6766, Code of 1923, and it is not necessary to again set them out.

The determination of the first two questions in your inquiry depends upon whether the local acts affecting Dallas County have been repealed by subsequent legislation, namely the amendments to Section 3317 of the Code of 1907 and to Section 6766 of the Code of 1923.

There is no express repeal of the said local acts affecting Dallas County, and so if there is any repeal of such acts, it must be by implication. Repeal by implication is regarded with disfavor by the courts, and the doctrine of implied repeal can be invoked and applied only in case that there exists such a repugnancy between the two statutes that they cannot consistently stand together, or where the subsequent general act revises the whole subject matter of the former so as to set up a new system or restate the entire law on the subject. This principle obtains, and is applied, where the two laws are general; and in case of a special law and a general law, the reasons for the application of the principle are all the more cogent. In any case, the thing to be ascertained and determined, in construing conflicting statutes, is, what was the intention of the Legislature? Where the older statute is special and the subsequent one general, mere inconsistency in the provisions of the two, alone, is not enough to imply a repeal of the older special law. The repugnancy between the two must be so glaring and irreconcilable as to clearly manifest a legislative intent to repeal. *State ex rel Tubbs, et al. vs. White, et al.*, 160 Ala. 168, 170, 49 So. 78; *Tucker vs. McClendon, et al.*, 210 Ala. 562, 98 So. 797; *Board of Revenue vs. Johnson*, 200 Ala. 533, 76 So. 859; *State ex rel Tyson vs. Horton*, 142 Ala. 90, 38 So. 761; *Southern Express Co. vs. Tuscaloosa*, 132 Ala. 326, 31 So. 460; *Fuqua vs. City of Mobile*, 23 Ala. App. 74, 121 So. 693.

The law does not allow the exposition to revoke or alter, by construction of general words, any particular statute, where words of the two acts, as compare with each other, are not so glaringly repugnant and irreconcilable as to indicate a legislative intent to repeal, but may have their proper operation without it. It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special act, or, what is the same thing, by a local custom. Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature has been turned to the special act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. Endlich on the Interpretation of Statutes, p. 298.

In my opinion, the general acts and the local acts affecting Dallas County are not in conflict to such an extent that there is not a field of operation for both of them. I do not think that there is anything in the general acts which would lead one to the conclusion that the legislature, in amending Section 3317 of the Code of 1907 and Section 6766 of the Code of 1923, intended to cover the entire field of the subject and to repeal or supersede all local laws dealing with the subject.

I am familiar with the case of *Isbell vs. Shelby County*, 10 Ala. App. 639, wherein it was held that General Acts 1907, p. 583, codified as Section 3715 of the Code of 1907, impliedly repealed Local Act, 1900-01, pp 220-224, though the said general act contained no general repealing clauses.

An inspection of the Act of 1907 made it manifest that it was the general intent of the Legislature by that act to establish a uniform system throughout the state fixing the ex officio fees of clerks of the circuit courts in the several counties of the state, and the presumption was indulged in that

the local acts on the same subject matter and inconsistent with the general act were intended to be repealed.

An examination of this case, however, will show that it dealt with the fees due the clerk of the circuit court of Shelby County. The local act of 1901 fixed the compensation of the clerk of the circuit court of Shelby County for ex officio fees at \$600.00. The general act of 1907 fixed a different fee for ex officio services of clerks of the circuit courts in the state. It can easily be seen that the legislature intended for the 1907 act to cover the entire field, because otherwise the act would be unconstitutional, having been passed subsequent to the 1901 Constitution, Section 96 of which is as follows:

"The legislature shall not enact any law, not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

Certainly it cannot be said that the legislature intended to pass an unconstitutional act. Therefore, it is necessary to say that the 1907 act fixing the ex officio fees of clerks of the circuit courts in the state necessarily was intended to apply to all the said clerks, and therefore, repealed and superseded the 1901 local act.

The same is true in the case of *Barnes vs. State ex rel Tate*, 162 So. 406, 230 Ala. 596, wherein it was held that an act of October 19, 1932 which amends Section 3762 of the Code, has the effect of repealing the local act of February 18, 1935, applying to witness fees in Dallas County. Mr. Justice Foster, in the opinion in that case, said as follows:

"We are asked to review the holding that the act of 1932 amending section 3762, Code of 1923, repealed the local act of 1895 for Dallas County. The amendatory act was adopted of course subsequent to the Constitution of 1901, containing section 96, requiring all such acts to apply to all counties in the state (except Jefferson and Montgomery, by amendments). *Daly v. Johnson*, 225 Ala. 6, 141 So. 909; *Birmingham Electric Co. vs. Harry*, 215 Ala. 458, 111 So. 41; *Crow vs. Board of Com'rs*, 228 Ala. 107, 152 So. 26. So that if the act of 1932 is not applicable to Dallas County, it violates section 96 and is void, although it only purports to amend a Code section, which was theretofore of limited application. Its language is sufficient to include Dallas county, though the Code section may not have theretofore so applied.

"Giving it an interpretation which will not offend section 96, and which is not unreasonable, will uphold it, when making it applicable to all counties, except to Dallas, will strike it down in its entirety. We think, therefore, that the Legislature must have intended to apply it so as to uphold it. As a valid act, it governs generally in all counties except those exempted from Section 96, and having a local law, and repeals local laws in other counties in conflict.

"We prefer to base our concurrence in the result reached in the trial court upon the basis of that reasoning, considered in connection with the theory suggested in *Isbell vs. Shelby County*, 10 Ala. App. 636, 65 So. 706, in which section 96, *supra*, is not mentioned, perhaps by oversight. Upon the basis of the theory of that case alone, the act of 1899, *supra*, might be held to have repealed the Dallas County local act."

I am of the opinion that neither of the two cases just above referred to are decisive of the question here at hand. In my judgment there is nothing to even remotely indicate that it was the legislative intent that the local acts of Dallas County be repealed or superseded. Most certainly that intent is not clearly demonstrated.

I am of the opinion that the question here presented is more nearly governed by other decisions of the Supreme Court.

In the case of *State ex rel Tyson et al. vs. Horton et al.*, 142 Ala. 90, the Supreme Court held that the local act approved February 28, 1903, providing that members of the Board of Revenue of Montgomery County should be appointed by the Governor, was not repealed by the general election law approved October 9, 1903, which provided for the election of county commissioners or members of boards of revenue in each county, or courts or boards of like jurisdiction. In that case, the respondents were appointed and commissioned by the Governor of Alabama as members of the Board of Revenue of Montgomery County, under a local act approved February 28, 1903, and the relators were duly elected to the Board of Revenue of Montgomery County under the general election law approved October 9, 1903. It was the contention of the relators that the local statute under which the respondents claimed the right of office was repealed by the general law of October 9th. The general law of 1903 provided for the election of members of the commissioners' courts or boards of like jurisdiction in each county in the state. It also contained a repealing clause as follows: "All laws or parts of laws in conflict with this act shall be and the same are hereby repealed." The Court said that the sole question for determination was whether the general act repealed the local act and that, there being no express repeal of the local act, that if there was any repeal it must be by implication. The Court held that both acts had a field of operation and applied the principle that repeal by implication is not favored and that unless the intention to repeal clearly appears, a repeal will not be implied.

In the case of *State ex rel Tubbs v. White*, 160 Ala. 168, 49 So. 78. The Supreme Court held:

"Mere inconsistency in the provisions of a special former statute and a later general one is not enough to authorize an implication that the older special statute was repealed by the later general one, hence General Acts 1903, page 289, as amended by General Acts 1907, page 482, did not repeal by implication the special act (Local Acts 1896-97, page 514) creating a special school district, nor was such special act affected by the Municipal Code Act, General Laws, page 378."

The local act referred to created a special school district in Hale County, Alabama, and defined its powers and duties. It was insisted that the general law enacted in 1903, as amended in 1907, repealed the special law, although neither of them contained any express provisions of repeal or a general repealing clause. If there was any repeal, therefore, it was by implication. The Court based its conclusion on the fact that repeal by implication is not favored and will not be implied unless there is a clear manifestation on the part of the legislature that the general act supersedes all special acts.

In the case of *Board of Revenue et al. v. Johnson*, 200 Ala. 533, 76 So. 859, the Supreme Court said that Senate Bill No. 744, approved September 16, 1915 (Laws of 1915, page 589), providing that in all counties whose aggregate

tax value amounts to one hundred thousand dollars, all persons shall be relieved of legal obligation to work on public roads, etc., was not repealed by the re-enactment of a provision of the Code of 1907 by an act approved September 17, 1915, providing that all persons are liable to work on the public roads except all women and all men under eighteen. The said Senate Bill No. 744 was a general law with local application, applying to Jefferson County, placing the obligation to work on public roads. This relieved them of the duty imposed upon them by the provisions of Section 5777 and 5778 of the Code of 1907. Subsequent to the passage of said general law with local application, the provision of the 1907 Code dealing with the requirements of public road service was re-enacted, and the decision of the Court was to the effect that the local law affecting Jefferson County was still in operation and effect. It is my opinion that this case is very much in point with the question here at hand.

In the case of **Fuqua vs. City of Mobile**, 23 Ala. App. 74, 121 So. 693, the Court of Appeals held to like effect on the theory that repeal by implication is not favored and will never result in a case where there is reasonable field of operation for a just construction of both laws, and special provisions are not repealed by general provisions on the same subject. I also call your attention to the case of **Reed vs. Wallace**, 168 So. 900.

I am, therefore, of the opinion that Dallas County should publish a financial statement quarterly, as required by local acts affecting Dallas County, heretofore referred to.

My answer to your second question is that the costs of the publication of the financial statement of Dallas County must be paid for in accordance with the terms of the said local acts.

In answer to your third inquiry as to whether or not the State Comptroller, under the provisions of the so-called "Uniform Accounting Act" (General Acts 1935, p. 43), must furnish Dallas County with a form to be used in publishing such financial statements, it is my opinion that it is not incumbent upon the State Comptroller to furnish form. I have examined carefully the Uniform Accounting Act and find nothing therein which requires the State Comptroller to furnish such a form to the various counties in the State, or which requires the counties to use such a form, if furnished.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 26, 1938

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Filing Tax —

The recording of assignment of a mortgage, upon which mortgage a tax has not been paid, is subject to deed tax. Schedule 46, Section 348, Revenue Act of 1935.

The fact that a mortgage has been insured by FHA does not affect the filing tax on said instrument.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of June 29, 1938, which is as follows:

"There was presented to me this morning for recordation a written assignment of a mortgage by the First National Bank of Auburn, to Prudential Insurance Company, such assignment being dated June 23, 1938, the consideration being \$3,992.66. The original mortgage dated April 4, 1938, from Zada M. Starr and husband to The First National Bank of Auburn, securing an indebtedness of \$4,000.00, recorded in this office on May 3, 1938, at which time no mortgage tax was charged since the mortgage bank was exempt from the tax, being an instrumentality of the federal government.

"I will appreciate your opinion on the following questions:

"1. Is the assignment above referred to subject to tax (a) if filed for record by the First National Bank of Auburn; (b) if filed for record by the Prudential Insurance Company?

"2. If the assignment is subject to tax; (a) is it taxable as a deed under Schedule 46 of the 1935 Revenue Laws, or (b) is it taxable as a mortgage under Schedule 94 of the 1935 Revenue Laws?

"3. Does the fact that the mortgage has been insured by the Federal Housing Administration affect the taxability and, if so, how?

"I understand that the above is the first of a series of like assignments and I will, therefore, appreciate your letting me have your opinion on these questions at your earliest convenience."

In answer to your first inquiry, I am of the opinion that the assignment referred to is subject to the filing tax regardless of whether the Insurance Company or the bank files it for record. The assignment enures to the benefit of the Prudential Insurance Company which company is not exempt; therefore, regardless of who actually files the assignment, the tax is due.

In answer to your second inquiry, I am of the opinion that the assignment is not taxable under Schedule 94 of Section 348, Revenue Act of 1935, but is taxable under Schedule 46 of the same section, which provides in pertinent part as follows:

"No deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in any such property, **except the transfer of mortgages on real or personal property within this State, upon which the mortgage tax has been paid**, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record. " (Emphasis supplied).

By the words "except the transfer of mortgages on real property within this State upon which the mortgage tax has been paid" the legislature

specifically exempted such mortgages from the payment of the tax. Therefore, it was the intention of the legislature to tax all other transfers or assignments of mortgages. "The exception of a particular thing from the operation of the general words of a statute shows that, in the opinion of the lawmakers, the thing excepted would be within the general words had not the exemption been made." Lewis' Sutherland Statutory Construction, (2d) Vol. II, page 672, Section 351.

I am aware of the decision in the case of **Garrison, Judge of Probate v. Hamlin**, 215 Ala. 39, 109 So. 106, wherein the deed tax statute of 1923 was held not applicable to the transfer of a mortgage. The statute of 1923 however, differs from the statute of 1927 in that it does not contain the exemption. Necessary implication made the 1927 statute applicable to the transfer of all mortgages upon which the mortgage tax had not been paid. **Biennial Report of Attorney General, 1930-32, p. 803.**

Schedule 94 of Section 348 of the Revenue Act of 1935, sets out the deed tax applicable at the present time, and is identical with the 1927 statute in all provisions pertinent to your inquiry. The exemption is not, in my opinion, tantamount to payment. Therefore, I am of the opinion that the deed tax is applicable in the present instant. **Biennial Report of Attorney General, 1926-1928, page 410; Biennial Report of Attorney General, 1928-1930, pages 168 and 811; Biennial Report of Attorney General, 1930-32, page 803.**

The case of **Thompson, Judge of Probate v. Smith**, 27 Ala. App. 460, 174 So. 796; 234 Ala. 409, 174 So. 797, does not involve the transfer of a mortgage where the mortgage tax had not been paid.

In answer to your third inquiry, I refer you to an opinion of this office to Hon. John S. Golson, Judge of Probate, Butler County, under date of June 25, 1938, found in **Quarterly Report of Attorney General, Vol. XI**. This opinion holds that the fact that a mortgage is insured by the FHA does not exempt it from the mortgage filing tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 26, 1938

Hon. Chas. E. McCall,
State Auditor,
Montgomery, Alabama.

Jefferson County — Solicitor's fee in the Inferior Criminal Court
— Local Act No. 371 — Local Acts of 1935, p. 228.

Circuit Court of Jefferson County authorized to tax \$2.50 as Solicitor's fee who prosecuted appellant in the Inferior Criminal Court of Jefferson County.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry from which I quote as follows:

"Please refer to an act of the legislature, approved September 7, 1935, and found in Local Acts of Alabama at pages No. 228-234 and

with particular regard to the last part of Section One found on page 234 of said Local Acts and to an act of the Legislature approved March 26, 1936, and found in General and Local Acts of Alabama, Extra Session 1936, at page No. 30 and as House Bill No. 110 and advise the amount of the solicitor's fee to be taxed and collected by the Clerk of the Circuit Court of Jefferson County, in a case appealed from the Inferior Court of Jefferson County Court of Misdemeanors, wherein the defendant was convicted of a misdemeanor and where on an appeal to the Circuit Court the defendant was convicted in said Circuit Court.

"Your attention is invited to Opinions of the Attorney General for July, August and September, 1936, page No. 18, October, November and December, 1936, page No. 56 and to the Code of Alabama, 1923, Sections No. 3759 and No. 5512."

The pertinent legislative provisions dealing with the subject of your inquiry are as follows:

"3759. SOLICITORS' FEES; HOW TAXED AND COLLECTED.

— For every conviction for a misdemeanor in the county courts or inferior courts there shall be taxed and collected as a part of the costs and paid into the county treasury the same solicitor's fees provided for convictions in such cases in the circuit court whether such judgment be paid in the county court, or on appeal to the circuit court."

"3759. (as amended, Act. No. 54, General Acts of 1936, p. 30) Section 1. That section 3759 of the Code of Alabama of 1923, be amended to read as follows: Section 3759. For every conviction for a misdemeanor in the County Courts or Inferior Courts there shall be taxed and collected as a part of the costs and paid into the County Treasury the same Solicitor's fees provided for conviction in such cases in the Circuit Court, provided that in the event of an appeal to the Circuit Court no Solicitor's fees shall be taxed or collected for the services of a Solicitor in the Circuit Court.

"5512. SOLICITORS' FEES IN COUNTY COURTS; HOW TAXED AND COLLECTED. — For every conviction of a misdemeanor there shall be taxed and collected as a part of the costs and paid into the county treasury the same solicitors' fees provided for conviction in such cases in the circuit court; and said fees shall be placed into the solicitor's fund of such county by the treasurer of said county; and on appeal to the circuit court, the same shall be taxed as a part of the costs in addition to the solicitor's fee taxed for such conviction in the circuit court, and this solicitor's fee previously taxed in the county court or inferior court, shall be paid, when collected, into the county treasury, and placed in the solicitor's fund of such county by the treasurer of said county. (1915, p. 817, No. 7; 1923 p. 203, No. 3).

✓ "Act No. 371, Local Acts of 1935, p. 228. * * * The compensation of the solicitor (of the Inferior Criminal Court of Jefferson County) shall be fixed by the County Commission of Jefferson County. There shall be taxed as a part of the costs in each misdemeanor case prosecuted by such solicitor the sum of Two Dollars and fifty cents (\$2.50) as solicitor's fee, and in all felony cases prosecuted by said solicitor

there shall be taxed the sum of Five (\$5.00) Dollars as solicitor's fee, which solicitor's fee shall be collected by the clerk of said court, or by the Clerk of the circuit court when said cause is not finally determined in this court, and shall be by such clerks paid into the general fund of the county treasury."

The amendatory Act of 1935, *supra*, changed Section 3759 by leaving off the words, "whether such judgment be paid in the county court, or on appeal to the circuit court," and by adding the words, "provided that in the event of an appeal to the circuit court no solicitor's fees shall be taxed or collected for the services of a solicitor in the Circuit Court.

The last legislative expression on the subject is contained in the amendatory Act No. 54, *supra*, approved on March 26 1936, which provides, as did the original act, for the taxation of the same solicitor's fee for conviction in the inferior or county courts that is provided for convictions in such cases in the circuit court, and further, that on appeal, no solicitor's fee shall be taxed or collected for the services of the solicitor in that court.

When the Local Act No. 371, *supra*, fixing a solicitor's fee for prosecutions in the Inferior Criminal Court of Jefferson County, was passed, the legislature contradicted General Acts No. 3759 and No. 5512, *supra*, and to the extent of such contradiction, which is confined to the amount of the fee to be taxed, repealed the general law in its application to the Inferior Criminal Court of Jefferson County.

The re-enactment in 1935 (Act No. 54, *supra*) of Section 3759, *supra*, with the only material change forbidding double taxation of a solicitor's fee, and no change as to the amount of such fee, did not add to or detract from the already existing conflict induced by the local act applicable to the amount of solicitor's fee to be charged to a defendant who is convicted in the Inferior Criminal Court of Jefferson County.

The Supreme Court of Alabama has held that a general law does not repeal a special or local law unless clearly implied or expressly provided. The courts frown upon repeal by implication.

"A general statute does not repeal a special one unless such is the plain legislative intent, even when they may contain somewhat inconsistent provisions. — *State vs. White*, 49 So. 78, 160 Ala. 168.

"Later general act does not repeal a former local act relating to the same subject matter unless repeal is necessary to give words of general act any meaning at all. *Board of Revenue v. Johnson*, 76 So. 859, 200 Ala. 533.

"Repeal by implication is not favored, and a law dealing with a special subject is not repealed by a subsequent general law unless in clear conflict. *Tucker v. McLendon*, 93 So. 797, 210 Ala. 562.

"Special provisions are not repealed by general provisions upon the same subject; and no general law, subsequently enacted, can be construed to add other conditions to those required by the special law, unless the latter law clearly manifests upon its face an intention to add such new conditions, and thus specially aims at a modification of the former law by a cumulation of conditions. — *Mobile & O. R. Co. vs. State*, 29 Ala. 573."

The purpose and intent of the legislature as manifested by Local Act No. 371, supra, was to fix and prescribe a solicitor's fee for the Inferior Criminal Court of Jefferson County; that fixation was in conflict with the general law. The mere re-enactment of the general law pertaining to a general fee for solicitors of county or inferior courts, without a more emphatic pronouncement of an intent to repeal such re-enactment not altering an existing conflict induced by adoption of the local act, does not in my judgment indicate a legislative intent to modify or change the fees fixed by the local act, supra. Therefore, the amount of solicitor's fee of the Inferior Court under consideration that may be taxed for prosecution and conviction for an offense classed as a misdemeanor is \$2.50.

The fixation of the fee for such court by adoption of the local act, to which citation has already been made, does not conflict with the provisions of the Amendatory Act No. 54, supra, which provides "that in the event of an appeal to the Circuit Court no Solicitor's fees shall be taxed or collected for the services of a Solicitor in the Circuit Court." The object and purpose of this provision is to prevent double taxation of solicitors' fees, whether the original fee be one fixed by the general law or by a local act. The legislature dispensed with a fee for the Circuit Solicitor for the prosecution of appeals from county and inferior courts, and only the fee provided by law for prosecution in the inferior or county court may be charged. The amount of that fee under the facts outlined in your inquiry is \$2.50.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 28, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Court of Appeals — Employment and compensation of additional clerical assistance — 1. Compensation of Stenographer employed under Section 765 of the Code may be paid from the general funds of the State.

Statutes — General Appropriations Act — Section 25 of Acts 1927, page 681 was not validly enacted in view of Section 71 of the Constitution.

Statutes — Appropriations — Appropriation for payment of the compensation of additional clerical assistance provided by Subsection 3 of Section 765 of the Code of 1923 is a continuing one and was not repealed nor affected by the enactment of the Budget and Financial Control Act (Acts 1932, page 35) nor by subsequent appropriation acts.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Under Section 25 of Acts 1927, page 681, which is amendatory of Section 765 of the Code of 1923, the Court of Appeals is provided with

one stenographer, whose employment has been determined to be necessary as is provided by law.

"Query: Is the compensation for this service to be paid out of the General Fund as provided in Section 765 of the Code of 1923, Subdivision 3?"

In my opinion, the additional stenographer provided for the Court under the provisions of Section 765 of the Code of 1923 may be paid out of any funds in the Treasury, including, of course, the general fund.

The General Appropriations Act, (Acts 1935, pages 792, 794) insofar as the same is applicable to the Court of Appeals, provides:

"For compensation of presiding judge, \$4500, for compensation of two associate judges at \$4500 — \$9000; (we interpolate that these provisions have been amended in a manner not here pertinent by Acts 1936-37, page 167) other salaries, \$5400; supplies and materials, \$190; postage, telephone and telegraph \$162.50; printing and binding, \$1735; insurance and bonding, \$12.50 — \$21,000."

I understand from your request that the Court of Appeals has requisitioned the services of a stenographer in addition to the Clerk's clerical assistants whose compensation is paid from the above-quoted appropriation.

In the 1931 and the 1935 General Appropriations Acts the provision contained in Section 25 of the 1927 Act, quoted *infra*, was omitted, so that there is now, in no event, authority for the employment of clerical assistance under said Section 25 of the 1927 Act.

However, Section 765 of the Code of 1923, which provision has been incorporated into five successive codifications of the statute, was not repealed, in my opinion, by Section 25 of the 1927 Act. Said Code section provides, in part:

"765. Employment of additional clerks in state departments. —

"1. Whenever the employment of any clerical assistance, in addition to that prescribed by law, in any of the state departments, may become necessary in the transaction of the public business, the head of such department must certify to the governor an application for such additional force, setting forth the contingency and the nature and extent of the work to be done, and that the same can not be performed within the time that the public interest requires by the regular force employed in such department, and thereupon the governor, being satisfied that the public interest demands such service, must issue an order authorizing the employment of such clerical assistance for such time as he may deem necessary, and cause the application to be filed in his office; and that no such clerk or assistant shall be employed until such application is certified and such order passed. * * *

"3. The compensation of such clerks must be paid upon account stated, certified by the head of the proper department that the same is correct, and for services performed under the provisions of this section, and approved by the governor, upon warrant of the auditor, out of any money in the treasury."

Section 25 of Acts of 1927, page 681, provided:

"Section 25. Whenever the employment of any clerical assistance in addition to that prescribed by this Act in any of the State Departments may become necessary in the transaction of the public business, the head of such department must certify to the President of the State Board of Administration, an application for such additional force, setting forth the contingency and the nature and extent of the work to be done and that the same cannot be performed within the time that the public interest requires by the regular force employed in such department and thereupon the President of the Board of Administration — being satisfied that the public interest demands such service, must certify his approval to the Governor. In the event the Governor approves such employment, he must issue an order authorizing the employment of such clerical assistance for such time as the President of the Board of Administration certified was necessary and cause the application and order to be filed with the President of the Board of Administration, who shall, upon the Governor's approval of such appointment."

This section was incorporated into the General Appropriations Bill for that quadrennial period. If it was validly enacted as a part of the General Appropriations Bill, it would evince a legislative intention to repeal Section 765 of the Code of 1923, being a substantial substitute for the cited Code section. And if Section 765 of the Code was repealed by Section 25 of the 1927 Act, *supra*, it was not revived after Section 25 of the 1927 Act ceased to be law by virtue of its subsequent omission from General Appropriations Bills.

However, in my opinion, Section 25 of the 1927 General Appropriations Act, *supra*, was not validly enacted by the Legislature for the reason that it runs afoul of Section 71 of the Constitution, which provides:

"71. The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the state, for interest on the public debt, and for the public schools. The salary of no officer or employe shall be increased in such bill, nor shall any appropriation be made therein for any officer or employe unless his employment and the amount of his salary have already been provided for by law. All other appropriations shall be made by separate bills, each embracing but one subject."

Cf. *In Re Opinions of the Justices*, 229 Ala. 98. *State v. Smith*, 188 Ala. 432. *Woolf v. Taylor*, 98 Ala. 254.

Not being a valid enactment of the Legislature, by reason of the fact that its inclusion within the General Appropriations Act is inhibited by Section 71, Constitution, the said Section 25 of the 1927 General Appropriations Act, *supra*, was not effective to repeal Section 765 of the Code of 1923, and that Code section is still in full force and effect.

Subsection 3 of Section 765 of the Code is, in my opinion, a sufficient appropriation of any money in the State Treasury for the purpose of carrying out the provisions of Subsection 1 thereof. *State Ex Rel Turner v. Henderson*, 199 Ala. 244.

It is further my opinion that the appropriation contained in Subsection 3 of said Code section is a continuing one and that the same was not re-

pealed nor affected by the provisions of the Budget and Financial Control Act (General Acts 1932, page 35), nor by subsequent appropriation acts. See *In Re Opinions of the Justices* (Ala. Sup.) 176 So. 367. *Southern Industrial Institute v. Lee* (Ala. Sup.) 175 So. 365. Cf. *Quarterly Report of the Attorney General*, Vol. XI, page 34.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Matt A. Boykin,
Judge of Probate, Mobile County,
Mobile, Alabama.

Heirs and distributees are not entitled to notice relative to hearing of account, under oath, by special administrator.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry as follows:

"I should appreciate your advice regarding the following matter:

"Does section 5751 of the Code of 1923, regarding the settlement of a special administrator ad colligendum, imply that notice of such settlement and of a day set for hearing the matter of the settlement, must be given to the distributees of the estate as is provided in section 5904 for the final settlement of a regularly appointed executor or administrator?"

It is my opinion that the heirs and distributees of an estate for which a special administrator was appointed pursuant to Section 5748, Code of Alabama, 1923, are not lawfully entitled to any notice of the day fixed by the court to pass upon the verified account filed by such administrator, in settlement of his administration, pursuant to Section 5751, Code of Alabama, 1923, which I quote as follows:

"When authority of administrator ad colligendum ceases; duties afterwards. — Upon the grant of letters testamentary or of administration, the authority of such special administrator ceases, and on demand he must deliver to the rightful executor or administrator all the assets of the deceased which may be in his hands, and render an account on oath of all his proceedings to the probate court."

The appointment of a special administrator by the Probate Court is strictly a statutory proceeding and only such rules and regulations as the legislature has seen fit to make have application thereto.

The Supreme Court of Alabama, speaking through Justice Somerville, in the case of *Arendale, et al, vs. Johnson*, 89 So. 603, expressing their views on "the contention of the appellants that the deceased having left no widow, that his next of kin are not entitled to the same mandatory preference in the appointment of a special administrator under Section 2526, as they would be in the grant of general letters of administration", held as follows:

"This contention is manifestly unsound, and was properly rejected by the probate court in the exercise of its sound discretion in the premises — a discretion which does not appear to have been abused.

"Under section 2526 there is a mere appointment by the probate judge, and not a grant of letters by the probate court, as under section 2519. A temporary administrator, or an administrator ad colligendum, as he is usually called, 'is a mere agent, or officer of the court, to collect and preserve the goods of the deceased, until some one is clothed with authority to administer them.' *Flora v. Mennico*, 12 Ala. 836. In that case it was expressly held that he could be removed at any time. Other than this preliminary duty of collection and preservation, he has nothing to do with the administration of the estate, as contemplated by sections 2519 and 2520. In discussing the several statutory provisions which regulate and control the grant of general letters of administration, including section 2520 (then section 1668 of the Code of 1852), this court said, more than 60 years ago, that —

"It is hardly necessary to observe that the rules here stated do not apply to the special administrations provided for by section 1676 of the Code.' (now section 2526 of the Code of 1907).

"That statement was but a dictum, but it reflected the opinion of a very able bench, and has never been challenged so far as we are advised. In 18 Cyc. 112, the rule is stated that —

"In the selection of a temporary or special administrator the surviving spouse, next of kin, legatees, and beneficiaries have as a rule no such absolute right to preference as in case of a general grant of letters; but the selection is rather controlled by the sound discretion of the court in view of the situation.'

"This text is supported by the cases cited.

"We can discover nothing in the language of section 2526, or in the nature of the limited duties to be performed thereunder, which suggests that the temporary appointment therein provided for was intended to be subjected to the antecedent restrictions which in terms and in policy are applicable only to grants of general letters of administration."

By analogy, the statutory mandate that the probate court shall give notice to the heirs or distributees of an estate of the date fixed to hear the petition of a general administrator for final settlement of his acts and doings in the premises has no application to the hearing of an account filed by a special administrator pursuant to Section 5751, Code of Alabama, 1923, nor is there any logical implication to be derived therefrom that notice shall be given such heirs and distributees. The very fact that such special administrator is an officer of the court refutes such implication, as the court is merely requiring an accounting from its agent in the performance of a duty imposed by law. It is, therefore, my view that none of the statutes governing the settlement of a general administrator have any application to an account filed by a special administrator.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Witnesses — Grand Jury Certificate —

A Grand Jury Certificate signed by the foreman is prima facie evidence of an existing claim against the county issuing the same, but cannot be paid by the treasurer or county depository until it is endorsed, certified to or registered by the Clerk of the Circuit Court.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"We have on file in this office a witness certificate issued to an Examiner of Accounts for attendance before the Grand Jury of Russell County, in March, 1932.

"The County Depository of Russell County has requested that we ask for an opinion as to the legality of this certificate, particularly in view of the fact that there are no records in Russell County indicating that this certificate was ever issued.

"We will ask therefore, if a witness certificate is prima facie evidence of an existing claim against the County by whom same is issued?"

A grand Jury Certificate signed by the foreman of the Grand Jury as described by you is prima facie evidence of an existing claim against the county by which it is issued. *Carville vs. Reynolds*, 9 Ala. 969; *Scruggs vs. State*, 111 Ala. 60.

The certificate described by you is issued pursuant to Section 8678, Code of Alabama, 1923, and although the certificate is prima facie evidence of an existing claim, the treasurer, or in the case of Russell County, the county depository, has no authority to pay this certificate until the same is certified to, endorsed, or registered by the Clerk of the Circuit Court of Russell County. *Ryan vs. Collins*, 196 Ala. 478. See also Section 3769, Code of Alabama, 1923.

This office has held in an opinion dated July 17, 1935, to Hon. H. M. Hughes, Clerk, Circuit Court of Madison County, that there is no time limit for the filing of the claims for witness fees payable from the fine and forfeiture fund, but allow me to call your attention Section 7245, Code of Alabama, 1923, which provides in part as follows:

"All persons entitled to such witness fees which present their claims for payment to the County Depository or custodian of the County funds within six years from the date of its collection by the clerk * * *

"All claims for witness fees reported by the clerk paid over to the county treasurer or custodian of county funds shall be forever barred after six years from the time such fees are collected and subject to disbursement * * * ."

In view of the fact that you advised me that there are no records in Russell County indicating that the certificate was ever issued, I assume that this certificate has not been endorsed, certified to or registered by the Clerk of the Circuit Court. I, therefore, advise you that the same cannot be paid by the county depository until this is done. The proper procedure to secure this endorsement is to set forth in the case of *Seruggs vs. State*, supra, at p. 65.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Howell Turner,
Secretary of State,
Capitol.

Disabled American Veterans of the World War, a corporation organized by an Act of Congress, need not file a certificate in pursuance of Section 7209, Code of Alabama, 1923, nor qualify with the State Tax Commission, pursuant to Section 7220 (1) Code of Alabama, 1928 (Michie's).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"We have been requested by the Disabled American Veterans of the World War, a corporation organized by an Act of Congress, to file its certificate designating agent in pursuance of Section 7209 of the Code without its filing a certified copy of its charter in this office and without such corporation qualifying with the State Tax Commission by paying the entrance, permit fee, and franchise tax.

"Please advise me if we can accept the certificate designating agent without a copy of the charter and without said corporation qualifying with the State Tax Commission, or should this corporation be required to qualify with the State Tax Commission by paying the minimum fees due and qualify with this office by filing certified copy of charter, and certificate designating agent for which payment of \$10.00 will be due this office.

"For your information I attach letter under date of May 19 and letter dated June 17 together with a brief on the incorporation. Please return these enclosures with your opinion."

Section 7209 of the Code of Alabama, 1923, referred to in your letter, and the section dealing with qualifying with the State Tax Commission (Section 7220 (1), Code of Alabama, 1928, Michie's) are contained in Article 26 of the Code. Section 7217 within this same article provides as follows:

"Section 7217. Exceptions. — The provisions of this article do not apply to corporations organized under the laws of the United

States; nor to corporations engaging in or transacting business of interstate commerce only within the state."

You will note therefore, that the provisions of Section 7209 and Section 7220 (1), supra, do not apply to the disabled American Veterans of the World War as the same is a corporation organized under the laws of the United States.

It is therefore my opinion that disabled American Veterans of the World War need not file a certificate in pursuance to Section 7209 nor qualify with the State Tax Commission, and that it is exempt from the payment of fees for these purposes.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. E. C. Whelan,
License Inspector,
Jefferson County,
Birmingham, Alabama.

(1) Licensed plumber under Schedule 110 of Sec. 348 of the Revenue Act of 1935, who subcontracts plumbing work is subject to additional license imposed on contractors by Schedule 42 of Sec. 348 of the Revenue Act of 1935.

(2) Licensed plumber under Schedule 110 of Section 348 of the Revenue Act of 1935, who sells gas water heaters in connection with plumbing supplies, is subject to license imposed by Schedule 56 of Section 348 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your request for an opinion as follows:

"Please give me your opinion on the following question. The Pate Company of Birmingham, Alabama, a partnership doing a plumbing business, paid a license under Schedule 110 on October 30, 1937. Algernon Blair Construction Company of Montgomery, Alabama accepted a contract from the U. S. Government and paid a license under Schedule 42 for accepting contracts exceeding \$200,000.00. Algernon Blair Company subcontracted to the Pate Company of Birmingham all of the plumbing work, which contract exceeded \$5,000.00. Would the Pate Company be due a contractor's license under Schedule 42 after having paid plumber's license under Schedule 110?

"The Pate Company also sells gas water heaters in connection with their plumbing business along with other plumbing supplies. Would they be due a license for selling gas water heaters under Schedule 56?"

It is my opinion that the plumbing contractor to whom you have referred is subject to payment of a license imposed on contractors by Schedule 42 of Section 348 of the Revenue Act of 1935, as follows:

"Schedule 42. CONSTRUCTION COMPANIES OR CONTRACTORS. — Any person, firm or corporation accepting orders of contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, electric wiring, or other steel, or any other building material, or shall accept contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or other composition, or who shall accept an order for or contract to excavate earth, rock or other material for foundations or any other purpose, or who shall accept an order for or contract to excavate earth, rock or other material for foundation or any other purpose, or who shall accept an order or contract to construct any sewer of stone, brick terra cotta, or other material, or shall accept a contract to construct highways, bridges, dams, or railroads, shall be deemed a contractor. Every contractor shall procure from the probate judge of the county in which he has his principal office a license to carry on the business of a contractor, provided that if such contractor has no office in this state, then he shall procure such license from the probate judge of the county where the contract is to be performed. Every such contractor shall pay a license to be ascertained in the following manner: * * * "

This office in an opinion to Hon. William W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, dated August 17, 1937, reported in Vol. 8, Quarterly Reports of the Attorney General, page 136, held that a "tin shop and roofing shop operator also accepting orders or contracts for work on or in building requiring use of paint, tin, lead, etc. required to secure both tin shop license, under Schedule 110, and contractor's license, under Schedule 42 of Section 348 of Revenue Act of 1935." We observed in that opinion that "The Legislature of Alabama has seen fit to specifically disclose its intention by express words to impose both the contractor's license and the tin shop license on a party operating as is the party operating as detailed in your letter by the provision found in Section 357 of the 1935 Revenue Laws found on page 447 of Simon's Code, which reads as follows:

"Section 357. Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

Therefore, following the reasoning set forth in the foregoing opinion to Judge Hill, I conclude that it was the intention of the Legislature for the plumber mentioned in your letter to pay a contractor's license pursuant to Schedule 42, supra, in addition to the license imposed by Schedule 110, supra.

With reference to your second question, my answer is in the affirmative. The payment of a license to carry on a plumbing business, and the procurement of a license to make contracts for plumbing work, would not, in my judgment, authorize such licensee to sell gas water heaters without the payment of license for such sale as is imposed by Schedule 56 of Section 348 of the Revenue Act of 1935. The license for selling gas water heaters is separate and distinct from the license for doing a plumbing business, and they are in no way related. Not all plumbers sell gas water heaters nor do all persons selling gas water heaters do a plumbing business.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. L. W. Price,
Judge of Probate,
Evergreen, Alabama.

Exemption to World War Veterans — Act No. 494, General Acts of 1935, p. 1057.

World War Veteran eligible to exemption from the payment of an occupational license tax, pursuant to the terms of Act No. 494, General Acts of 1935, p. 1057, (exempting veterans), is entitled to additional exemption on the business of selling gasoline to which he adds additional pumps at the same place of business.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"A World War Veteran here, who has the exemption, on account of disability, for a privilege license, applied last fall and was granted a license to operate a gasoline service station for one pump. This man now wishes to install two more pumps at the same location, all under the same roof and operate the three instead of one.

"May I legally change the War Veteran's license granted him and note thereon that the Licensee may operate three pumps instead of one without any additional cost to him?

"I am familiar with your opinion rendered some time ago that no War Veteran's license may be issued to a veteran for more than one business but I am not sure whether he could be granted permission to operate three pumps instead of one at the same time under the original license."

This office has already held in an opinion to you, Quarterly Report of the Attorney General, Vol. 3, p. 154, answering your inquiry if a person who has already purchased a license for one pump and wishes to install and operate additional pumps, that he may do so upon payment of the difference between the tax on one pump (which he has already paid) and that imposed for the number of pumps in additional operation. The answer of this office held that this applicant was entitled to procure such license at a reduced price provided the new pumps were a part of the same filling station equipment.

It is further my opinion that the operation of additional pumps at the same place as the first pump, for which license tax was paid, being merely an addition to the equipment, is nothing more than an enlargement and extension of the same business. The graduated tax is imposed by the revenue laws of Alabama for the privilege of selling gasoline at retail, is based upon the size of the business, and is determined by the number of pumps in operation.

The act granting exemption to a veteran limits such exemption to one business or occupation for which a license tax is required.

It is my conclusion that the veteran mentioned in your letter, assuming that the new pumps are merely an addition to existing equipment for which an

exemption has been granted, is entitled to an additional exemption, the amount of which, together with the exemption already granted on the same business, may not exceed the limit of exemption prescribed for one business.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Mrs. Marie Bankhead Owen, Director,
Department of Archives and History,
Capitol.

Department of Archives and History — Folders library cards and stationery to be used in filing may be paid for out of filing equipment fund.

Opinion by Assistant Attorney General Crittenden.

Dear Mrs. Owen:

This is to acknowledge your letter of July 27, 1938, which is as follows:

"The appropriation for supplies and materials of the Department of Archives and History is now exhausted. We have need for folders, library cards, stationery, etc., that are due to come out of that appropriation.

"However, we do have a balance on hand from the filing equipment fund of \$116.96. You can at once see that such items as folders, library cards, stationery, etc. pertain to the filing equipment. I am therefore asking you to give me an opinion for the benefit of the State Comptroller to the effect that he may approve requisitions out of this filing equipment fund for the items listed above."

In my opinion the folders, library cards and stationery, to which you refer, may be a legal charge against the filing equipment appropriation for the Department of Archives and History, if, in fact, they are used in filing. I refer you to Act No. 373, General Acts 1935, p. 792, paragraph 9, which provides in pertinent part as follows:

"9. Archives and History: * * * Supplies and Materials \$652.00; Postage, Telephone & Telegraph \$400.00; Printing & Binding \$191.00; Travel Expense \$500.00; Books, Periodicals and subscriptions, \$1,200.00; Filing Equipment \$1,250 — \$16,493.00."

I am of the opinion that the wording "filing equipment" is broad enough to encompass not only the cabinets themselves, but the necessary folders, cards and stationery required in connection therewith.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Mr. Fred Grantham,
Clerk of Circuit Court,
Geneva County, Alabama.

Election Contest — Circuit Clerk's costs and authority — Act No. 56, General Acts of 1931, page 75.

1. Costs of forms used by Circuit Clerk in summoning witnesses and in the issuance of other legal process in a primary election contest may not be paid by the county in which the parties to the contest reside, but must be borne by the respective parties to the contest at whose instance the expense was incurred.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which is as follows:

"In a Primary Election Contest, to be tried by the State Democratic Executive Committee, are subpoenas for the summoning of witnesses and other forms needed by the Circuit Clerk for the issuance of proper and legal processes requested by the parties to the contest under the 1931 Primary Act, Acts of the Legislature of Alabama, 1931, page 92, Section 48, properly paid for or furnished by the County, or are such forms paid for or furnished by the parties to the contest?

"What sum or sums, if any, should the Circuit Clerk require to be deposited by the parties to such contest for the payment of witness fees or other fees or costs?"

Your authority in a primary election contest is set forth and defined in Section 48, Act No. 56, General Acts of 1931, page 73, which is as follows:

"Upon the filing of any contest of nomination the chairman of the committee with which the contest is filed shall file a statement in the office of the Clerk of the Circuit Court of the county where the contestant resides of the fact that such a contest has been filed, giving the names of the parties thereto, the nomination contested and the day set for the hearing, and after such statement is filed the Clerk of the Circuit Court shall issue such subpoenas for witnesses and orders for production of documents and shall issue commissions for the taking of testimony by deposition as requested by either party, under the same rules and regulations as witnesses are summoned and depositions taken in Chancery Cases, each party to the contest being responsible for costs incurred by him for the **summoning and attendance of witnesses** on his behalf, and the clerk may issue execution for such costs the same as in civil cases. It shall be the duty of the sheriff to serve all process issued by the Circuit Clerk and execute all orders and processes of the committee, or sub-committee, trying the contest. Such committee, or sub-committee, shall have the same power and authority as the Circuit Judges of this State to enforce obedience to its orders and process; and to punish disobedience to its orders by fine or imprisonment, as for contempt, and such committee shall, of its own motion, or at the request of either party, have power to require any person to produce before it,

papers or documents pertinent to any inquiry before such committee or sub-committee. The chairman of the committee, or sub-committee trying the contest may issue directly to the sheriff process for the attendance of witnesses or the production of documents or commissions for taking depositions, without the intervention of the Circuit Clerk, as herein in this Act provided." (Emphasis ours).

An examination of the entire act reveals no provision therein which authorizes the county to pay the expense of procuring forms which you use in summoning witnesses and in the issuance of other legal process as stated in your letter. Without specific authority, the county has no legal right to pay this expense. **Quarterly Reports of the Attorney General, Vol. 3, page 44.**

It is my opinion that the aforequoted section requires each party to the contest to pay the expense incurred by him for the summoning or attendance of witnesses on his behalf. Therefore, if either of the parties incurred any expense for the summoning of witnesses in the contest, he would be responsible therefor.

With reference to your second inquiry, the question presented is now moot in view of the fact the contest in question has been disposed of by the State Democratic Executive Committee.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

The Probate Judge is entitled to fifty cents for making certificate of admission of patient to insane hospital.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 22, 1938, in which you request my opinion as follows:

"Please refer to Chapter 31, page 784 Code of 1923, Chapter 34, page 894 Code of 1923 and Section 7285 Code of 1923 and the fact that the Probate Judge is charging the County fifty cents each time he makes out papers for admission of patient to the insane asylum as of Section 1444 Code of 1923 and advise me as follows:

"Is a Judge of Probate entitled to a fee of fifty cents for making certificate for admission of patient to insane hospital, as prescribed by Section 1444, under Section 7285 'Each certificate given under the Chapter in relation to hospitals, diseases, infection and quarantine?'"

My answer to your request is in the affirmative. I call your attention to Section 7285, Code of Alabama, 1928, (Michie's), which section sets out the

allowances and fees of the judge of probate, and specifically to the paragraph of said section found on page 1230, which is as follows:

"Each certificate given under the chapter in relation to hospitals, diseases, infection and quarantine50

Hospitals, as therein used, in my opinion, include insane hospitals as well as other types of hospitals.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Counties — Legitimate express charges incurred in connection with the official duties of a register are payable by the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of July 20, 1938, which is as follows:

"I am in receipt today of a letter as follows:

"Hon. Chas. Lee,
State Comptroller,
Montgomery, Alabama.

"Dear Sir:

In many instances I am forced to prepay express charges on court files sent to Decatur, Alabama, to one of the Judges of the Circuit Court, also to pay express charges on files when they are returned by the Judge. I have been paying these charges out of my pocket from my own personal funds. In the majority of the cases I am not able to collect the money from the parties to the suit and I lose what I have paid.

"Please advise me if, in your opinion, that the County should not reimburse me out of the General Funds for these express charges. In my opinion, the County would be as much liable for the payment of these charges as it would for stamps, stationery and office equipment; and in the event that I collect any of these charges, I could refund the County.

"Please let me hear from you by return mail.

Yours truly,
C. H. Keller, Register.

"Will you please advise me if the express charges referred to in this letter would be a legal charge against the County?"

In answer to your inquiry, I am of the opinion that legitimate express charges in connection with the official business of a register are payable by the county.

Section 9604, Code of Alabama, 1923, as amended by Acts 1927, p. 693, is as follows:

"The Judge of Probate, Tax Assessor, Tax Collector, Register of the Circuit Court in Equity, Clerk of the Circuit Court, Sheriff and the County Treasurer or Custodian must be allowed reasonable expenses, for suitable books, stationery, **postage stamps**, used exclusively for official business, and telephones to be paid for by the county, on the approval of the Court of County Commissioners, Board of Revenue or other like governing body, and the Judge of Probate shall also be allowed expense for his seal of office, to be paid for by the county." (*Italics supplied*).

This section has been given a very liberal construction. The word "stationery" as used therein, has been held to include typewriters. **Underwood Typewriter Company v. Marengo County Bank**, 203 Ala. 128, 82 So. 158. This office has also held that the word "stationery" includes rubber stamps and photostat machines. — **Opinion of Attorney General to Chairman, County Commission, Walker County, February 19, 1938; Biennial Report of Attorney General, 1928-1930, p. 67.**

In view of the liberal interpretation given this section, I am of the opinion that the words "postage stamps", as used in said section, include express charges. The purpose of an allowance for postage stamps was to allow payment by the county to the officers therein named for legitimate expenses incurred in necessary mailing. The principle is applicable to all mailing, whether same be by the United States mail or by express. Therefore, in my opinion, such term is sufficiently broad to include express charges.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Alcoholic Beverage Control Board —

1. The Alabama Beverage Control Act is not effective upon military reservations within the confines of the State of Alabama ceded to the United States.

2. The Alabama Alcoholic Beverage Control Board may promulgate rules and regulations as may be mutually satisfactory to itself and the military authorities, for importation and disposition of alcoholic beverages for consumption upon military reservations within the state, which have been ceded to the United States.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I understand that a decision has recently been rendered by the Supreme Court relative to the importation of alcoholic beverages by Army Reservations located within wet States.

"Under dates of June 15 and August 12, you rendered opinions for this Board covering this subject. I am writing you at this time to ascertain what effect, if any, this recent Supreme Court decision has on your two opinions issued to this Board."

Two former opinions of this office (Quarterly Reports of Attorney General, Vol. VII, p. 207 and Vol. VIII, p. 85) following the reasoning of the Supreme Court of the United States, as we interpreted same in the case of **State Board of Equalization v. Youngs Market Co. et al.**, 81 L. Ed. 7, held that Section 2 of the Twenty-first Amendment to the Constitution of the United States was effective to prevent the transportation or importation of alcoholic beverages into any military reservation situated within the confines of the State of Alabama, which had been ceded to the United States, in violation of the laws of the State.

In the recently decided case of **Collins et al. v. Ycsemite Park and Curry Co.** (MS), the Supreme Court of the United States considered directly the question of the applicability of the California alcoholic beverage control laws to transactions in alcoholic beverages by a concessionaire within the limits of a national park which had been ceded to the United States by the State of California. The State of California contended that the Twenty-first Amendment was effective to prohibit any transactions in alcoholic beverages on Federal reservations except as provided for by state law, and that such transactions were subject to the regulations of its beverage control laws. The court, in disposing of the question determined that the Twenty-first Amendment was not effective to make the beverage control laws of California applicable to transactions in alcoholic beverages upon territory within the State ceded to the United States for constitutional purposes; and that the laws of California were operative thereon only to the extent that the same was authorized by the acts of session enacted by the state and acceptance of the said territory on the part of the United States.

In view of this decision of the Supreme Court of the United States, the former opinions of this office are overruled and withdrawn.

In the light of said decision, it is my opinion that, inasmuch as the acts of cession by Alabama to the United States of military reservations within the State make no provision for taxing operations upon said military reservations; and inasmuch as the channelization of the sale of liquor in Alabama by and through the Alabama Alcoholic Beverage Control Board is not effective upon such military reservations; the provisions of Alabama law relative to the taxing of malt and brewed beverages, and relative to the channelization of sales of other alcoholic beverages cannot operate upon transactions in such commodities consummated upon such military reservations.

It is further my opinion that pursuant to the general powers lodged in the Board to make necessary rules and regulations to carry into effect

the provisions of the act, the Alabama Alcoholic Beverage Control Board legally may proceed to promulgate such rules and regulations as may be mutually satisfactory to itself and military authorities for the importation of tax free malt or brewed and other alcoholic beverages for consumption or disposition upon such military reservations.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

1. Local Act of 1919, p. 77, is repugnant to Section 96 of the Constitution of 1901.
2. Ex-Officio fees of the Judge of Probate are governed by Section 7285, Code of Alabama, 1923.
3. Fees and allowances paid to an officer under a void law, cannot be recovered.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Please refer to Local Acts 1919, page 77, (H. 405 Moorer) and Section 7285 Code of 1923, and advise me as follows:

"1. Has the Act fixing the Ex-Officio fees for the Judge of Probate of Lowndes County above referred to been repealed by the adoption of the Code of 1923 or other General Laws covering the subject matter of Ex-Officio fees of Probate Judges?

"2. If such Act has not been repealed is such Act constitutional?

"3. If repealed would the Judge of Probate be liable for the amount received in excess of that provided by General Law?

"4. If not repealed and if same is unconstitutional would the Probate Judge be liable for the amount drawn in excess of amount allowed by General Law?"

Before answering your inquiry it will be necessary to examine the history concerning the ex-officio fees of Judges of Probate. Under the Code of 1907, Section 3720 provided, in part, as follows:

"All other official duties, for the compensation of which no express provision is made by law, such sum as may be allowed by the court of county commissioners, to be paid out of the county treasury, not exceeding, per annum \$200.00."

This was amended by General Acts of 1911, p. 154, wherein it was provided that the Judge of Probate was to be paid \$400.00 for the above named

services which are commonly known as the ex-officio fees of the Judge of Probate. See *Macon County vs. Abercrombie*, 184 Ala. 283. So that at the time the Local Act of 1919, referred to in your inquiry, was enacted, the law then in effect provided \$400.00 for ex-officio fees. The Local Act of 1919, p. 77, provides as follows:

"Section 1. BE IT ENACTED BY THE LEGISLATURE OF ALABAMA, That for all official duties and services, the compensation for which is not expressly provided for by law, the Probate Judge of Lowndes County, Alabama, shall be entitled to and allowed by the Board of Revenue of Lowndes County, Alabama, to be paid out of the general funds of said county, not exceeding \$800.00 per annum."

It is my opinion that at the time the Local Act of 1919, *supra*, was enacted, it was unconstitutional. *Carnley vs. Moore*, 218 Ala. 274. See also *Quarterly Reports of Attorney General*, Vol. XI, p. 142.

The uniform amount to be paid Judges of Probate for ex-officio fees was, as stated above, the sum of \$400.00. The Local Act of 1919, applicable only to Lowndes County, attempted to set up a fee or allowance for ex-officio services different from that of other counties in the state. This act, in my opinion, is repugnant to Section 96 of the Constitution, which provides as follows:

"Section 96. The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers." (Italics ours).

The above provision of the Constitution denies the right of the legislature to enact a law not applicable to all counties of the state regulating commissions or allowances to public officers. Further, it is my opinion, that this is an allowance to a public officer within the inhibition of subsection 24 of Section 104 of the Constitution. See *Osborne vs. Henry*, 200 Ala. 253. So, therefore, at the time the Local Act of 1919 was enacted, it was then unconstitutional and void. At the present time, ex-officio fees of Judges of Probate are governed by Section 7285, Code of Alabama, 1923, which provides the sum of \$400.00. This section is a codification of the 1911 Act, *supra*.

I am of the opinion, therefore, that the amount of the ex-officio fees of the Judge of Probate of Lowndes County is governed by Section 7285 of the Code of 1923 and he may receive for these services the sum of not more than \$400.00 per annum. My answer to this question pretermits a consideration of your first and third inquiries.

Your fourth inquiry must be answered in the negative. Although the Local Act of 1919, *supra*, may some day be declared unconstitutional by the Supreme Court, yet until that event occurs, Section 2619 of the Code of Alabama, 1923, set forth below, will protect the officer who has received moneys under the provisions thereof.

"Section 2619. OFFICER PAYING AND PERSON RECEIVING MONEY PAID UNDER VOID LAW, NOT LIABLE THEREFOR. — When any state or county official shall have collected or paid out any money, as fees, salary or compensation for official services rendered under any law of Alabama, general or special, which law, subsequent to such collection or paying out, shall be declared by the Supreme Court of Alabama to be unconstitutional or void or illegal, such officer shall not be liable either individually or on his official bond, in any

suit brought for the recovery of such money, so collected or paid out, nor shall the person to whom the same shall have been paid, be liable therefore."

You will note that this section provides that an officer shall not be liable for the recovery of money received by him under a void law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Dr. J. N. Baker,
Department of Public Health,
Montgomery, Alabama.

Health Department — Vital Statistics — Birth Certificates —
Delayed birth certificates filed in accordance with the provisions of
the General Acts, 1935, page 646, held to constitute prima facie evi-
dence of the correctness of their contents.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of July 6, 1938, in which you request my opinion as follows:

"Inasmuch as the correct date of birth plays an important part in the obtaining of pensions and benefits provided by private organizations and the Government, I would like to know what the probative value is of a certificate of birth occurring prior to the enactment of the Vital Statistics Law, but filed subsequent thereto, in this State."

In reply, I wish to call your attention to Section 1087 of the Code of 1923, which provides in part as follows:

" * * * Any such copy of the record of a birth or death, when properly certified by the state registrar, shall be prima facie evidence in all courts and places of the facts therein stated."

I wish to further refer you to the General Acts, 1935, page 646, Act No. 247, which provides as follows:

"An Act

"To provide for the filing of delayed certificates of birth and death.

"Be it Enacted by the Legislature of Alabama:

"Section 1. THE FILING OF DELAYED CERTIFICATES OF BIRTH OR DEATH PROVIDED FOR. Birth certificates shall be accepted for filing at any time after birth, provided they be authenticated by the signature of the attending physician. If the birth was attended by a midwife, or any other person, and the certificate is tendered one year or more after birth, it must be accompanied by such sworn statements or affidavits as the State Board of Health

shall prescribe. Death certificates shall be accepted for filing up to one year from the date of death, provided, that if tendered sixty days or more after death, they must be authenticated by such sworn statements or affidavits as the State Board of Health shall prescribe. Certificates of death occurring more than one year prior to tender shall not be accepted for filing. Nothing in this section shall exempt physicians, midwives, or other attendants at birth, or undertakers, or persons acting as undertakers at burials, from filing birth, still-birth, and death certificates, as prescribed elsewhere in this article."

You will note that the General Acts, 1935, page 646, quoted, *supra*, authorizes the acceptance for record of birth certificate at any time after birth provided they be authenticated by the signature of the attending physician or provided that such certificate is accompanied by such sworn statement or affidavits as the State Board of Health shall prescribe. You will further note that Section 1087 of the Code of 1923, provides that birth certificates of record shall constitute *prima facie* evidence of the truth of their statements and shall be so accepted in any courts in which they are presented as evidence.

The premises considered, it is my opinion that the probative value of a certificate of birth, which birth occurred prior to the enactment of the Vital Statistics Law and filed subsequently thereto in this State, should be considered the same as those filed after the enactment of the Vital Statistics Law, provided the provisions of the 1935 Act, quoted, *supra*, are followed strictly. In short, any birth certificate filed in accordance with the existing laws of Alabama, above quoted, has the probative value of *prima facie* evidence in any court.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. A. B. McDowell,
Tax Assessor,
Geneva County,
Geneva, Alabama.

Taxation — Escape Property Assessments —

1. Property sold under invalid tax sale, said tax sale having been set aside as provided for by Revenue Code of 1935, Section 232, held to be "an escape" and assessable for taxes as such.
2. Assessment for past due taxes on "escape property" held to be limited to five prior years.

Opinion by Assistant Attorney General Small.

Dear Sir:

I am in receipt of your letter of August 23, 1937, which is as follows:

"For the year 1930 W. H. Green, Bellwood, Ala. owned a house and lot in Bellwood that he did not return for taxation, the Tax Assessor assessed to him from the records this property, with a house but in 1931 the house burned and Mr. Green has never redeemed and

it now develops that this property was erroneously described when sold and the State Tax Commission has declared the sale erroneous and instructed me to assess.

"Shall I assess this property for 1930 with the house and for the next seven years assess as a vacant lot? Can I go back further than five years since it was sold in error?"

In reply, I wish to advise you that in my opinion the property referred to by you in your letter should be assessed as an escape, provided the assessment was set aside in the manner and form provided by law. I wish to refer you to Section 232 of the Revenue Code of 1935, which provides as follows:

"Section 232. For the real estate bid off for the State in each case the Judge of Probate shall make out a certificate of purchase to the State of like import to the one provided for in the preceding section, and deliver the same to the Tax Collector who shall, on final settlement, deliver all certificates received by him from the Judge of Probate to the State Comptroller, who shall examine carefully all certificates of purchase of real estate where the same were bid in for the State at tax sale. When the same are received by him, and if in his opinion, such sale was erroneous for want of regularity, proper or sufficient description, error in advertising or for any other cause that may appear from such certificates, he shall so declare it and return the certificate to the Judge of Probate, and charge the account of the officer making the error with all taxes, interest, fees, and costs involved in said sale. The Comptroller shall notify the Judge of Probate who issued the certificate of such cancellation and shall also notify the Tax Assessor of the County in which the property is situated, and direct him to assess the property as an escape for the years in which it was subject under existing laws. The Comptroller when he has settled the accounts of the Tax Collector shall deliver to the State Land Commissioner all certificates of land bid in for the State which have been accepted by him, and said Land Commissioner shall cause the same to be recorded in a book kept in his office for that purpose and properly indexed for convenient reference. Lands bid in for the State shall not thereafter be assessed except as herein provided until the same have been redeemed or sold by the State."

You will observe that the above quoted provisions of law authorize the setting aside of the sale and re-assessment of the property as an escape for taxes due.

Assessment as an escape for taxes due during a period of years past is governed by the provisions of Section 45 of the Revenue Code of 1935, which provides as follows:

"Section 45. Whenever the Tax Assessor shall discover that any property has escaped taxation in any assessment within five years next preceding the current year, he shall list, return and value said property for assessment for the years during which same has escaped taxation, and shall also endorse on such returns the year or years for which the property has escaped taxation, and the accrual of a penalty of ten per cent of the taxes assessed thereon for each year. The Tax Assessor shall give notice of such escape assessment by reg-

istered mail, return receipt demanded, to the owner or to the agent or attorney of such owner, notifying such person to appear before the Assessor in person, or by agent or attorney, within twenty days after such notice is given, if there be an objection to the assessment and notifying such person that if no objection is made said assessment will be made final on the twentieth day after the mailing of such notice of escape assessment. If on the date for hearing such objection the person against whom the assessment is made fails to appear, or, if in the opinion of the Tax Assessor the assessment should not be changed and the assessment is proper, then the Tax Assessor shall make the assessment final. "The property owner if he has filed objection to such assessment, may appeal from the assessment to the Circuit Court of the County in which the property is located within thirty days after such assessment becomes final, by giving notice in writing to the Tax Assessor and by filing a copy of such notice with the Clerk of the Circuit Court and giving bond to be approved by and filed with the Clerk of the Circuit Court to cover costs and thereafter such case shall be tried as other tax cases appealed to the Circuit Court from the Board of Review. The taxpayer or the State shall have the right to demand a trial by jury by filing a written demand therefore, within ten days (10) after the appeal is taken. Whenever any escape assessment is made final, the taxes shall immediately become due and the Assessor or Deputy Assessor shall forthwith certify the assessment to the Collector, who shall forthwith collect same, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the Clerk of the Circuit Court in double the amount of the taxes, payable to the State of Alabama, conditioned to pay all taxes, interest and costs due the State, County or any agency or subdivision thereof."

You will observe that the provisions of this section limit the assessment of taxes on escape property to a period of five years.

You state in your letter that the house on the property in question was burned at some time during the year 1931. Since you, as tax assessor, are permitted to assess only five prior years' taxes, in my judgment, you cannot assess the house that burned in 1931, and would necessarily have to assess the property as a vacant lot, for a period of five prior years.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. C. E. Carmichael,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Treasurer in lieu of county depository — Resolution fixing compensation at \$75.00 per month and subject to change in the discretion of the County Commissioners authorizes reduction in compensation.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 20, 1938, which is as follows:

"The Court of County Commissioners of Colbert County, Alabama, having failed to secure a satisfactory bid from a bank to act as Depository for the year 1938, as provided by Section 316 of the Code of Alabama, 1923, designated an individual to act as County Treasurer, as provided by Section 322 of the Code, and fixed his salary at \$54.16 per month. The Minutes of the Court of County Commissioners of said meeting of December 6, 1937, relating to the County Treasurer are as follows:

"The Court met on this, December 6, 1937, to consider any bids that might be received from any bank in the County for placing the funds of the County in a bank in the County, and no bids were received.

"Whereupon, the Court considered the matter of selecting a County Treasurer for the year 1938, and Commissioner Raymond Sherrill moved that, whereas, the Court of County Commissioners is unable to secure from any bank in the county a bid for handling the County funds for the year 1938 which is satisfactory to the Court of County Commissioners, that the Court of County Commissioners select and designate some individual who may act as County Treasurer for the year 1938. This motion was seconded by Commissioner A. B. Blackburn, and a vote being taken, Commissioners Sherrill, Blackburn, Harris and Coburn voted for its adoption.

"Commissioner A. B. Blackburn moved that, whereas, the services of the present County Treasurer have been entirely satisfactory to the Court of County Commissioners and he has performed his duties faithfully and efficiently, that the Court of County Commissioners now select and designate Sam C. Cooke to act as County Treasurer for the year 1938, and that his salary be fixed in the sum of \$54.16 per month, and that his official bond as such Treasurer be fixed in the sum of \$50,000.00, and that the County pay the premium on said bond. This motion was seconded by Commissioner Paul Coburn, and a vote being taken, Commissioners Blackburn, Coburn, Harris and Sherrill voted for its adoption'.

"At an adjourned meeting, held on December 15, 1937, the Court of County Commissioners increased the amount of the salary to be paid to the County Treasurer to \$75.00 per month. The minutes of said meeting of December 15, 1937, pertaining to the County Treasurer's salary are as follows:

"Commissioner A. B. Blackburn moved that, Whereas, upon further consideration, it appears that the duties of the County Treasurer would justify the increase in his salary to \$75.00 per month for the year 1938, and that the salary of Sam C. Cooke, as County Treasurer, be and the same is

hereby fixed in the sum of \$75.00 per month during the year 1938, and subject to change in the discretion of the Court of County Commissioners, and that the Court of County Commissioners stipulate that the County Treasurer shall compile the Treasurer's Report that the law requires to be published. This motion was seconded by Commissioner Raymond Sherrill, and a vote being taken, Commissioners Blackburn, Sherrill, Harris and Coburn voted for its adoption'.

"1. Please kindly advise me whether the Court of County Commissioners has authority at this time to reduce the salary of the said County Treasurer from \$75.00 per month to \$54.16 for the balance of the year 1938.

"2. Please also advise me whether the Court of County Commissioners has authority to reduce the salary of the said County Treasurer below the sum of \$54.16 per month for the balance of the year 1938, if they see fit to do so."

In my opinion, both of your inquiries should be answered in the affirmative.

The original resolution designating Mr. Cooke as Treasurer in lieu of the County Depository was passed on December 6, 1937. Said resolution fixed his compensation at \$54.16 per month. The subsequent resolution, dated December 15, 1937, fixed his compensation at \$75.00 per month with the proviso that same be subject to change in the discretion of the Court of County Commissioners. This resolution superseded the resolution of December 6, 1937, relative to his compensation. As the last resolution specifically provided that the compensation is subject to change in the discretion of the Court of County Commissioners, same can be reduced as they see fit. This resolution was passed December 15, 1937, before Mr. Cooke assumed his duties as Treasurer in lieu of a County Depository.

In regard to the selection of a treasurer in lieu of a county depository, I wish to refer you to Biennial Report of Attorney General, 1930-1932, p. 817.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

Hon. W. L. Hobbs, Clerk,
Circuit Court, Russell County,
Phenix City, Alabama.

August 18, 1938

Where a judgment or decree is rendered by the Circuit Court sitting in Equity for the payment of alimony in regular monthly installments, and an execution has been issued on same within ten days as prescribed by statute, and returned by the sheriff "no property found," the clerk need not issue an alias unless the necessity arises for same or is demanded by the owner of said judgment or decree.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 22, 1938, in which you request my opinion as follows:

"A judgment awarding alimony payable monthly is rendered for which let execution issue.

"I have issued executions each month since date of judgment and handed same to the sheriff for collection, and the executions are returned to this office with the following sheriff's return thereon: 'No property found subject to levy'.

"Kindly furnish official opinion advising if I must continue to issue these monthly executions, even though they are returned with the sheriff's endorsement as stated above."

It is my opinion that when a register has followed the requirements of Section 7795 of the Code of Alabama, 1928, (Michie's) and issued an execution on any judgment or decree within ten days after rendition of such judgment or decree, and said execution has been returned by the sheriff, "No property found", that such clerk or register does not have to issue an alias execution unless such execution becomes necessary or is demanded by the owner of the judgment or decree.

Section 7795 is as follows:

"ISSUE OF EXECUTIONS MUST BE SIGNED AND TESTED. — The clerk or register must issue executions on all judgments in favor of the successful parties within ten days after the rendition of judgment, unless otherwise directed by the court or the judge presiding at the trial of the cause. The writ must be signed by the clerk, and tested on the day it is issued."

Alias executions may issue under Section 7802, Code of Alabama, 1928 (Michie's) which is as follows:

"Section 7802. MORE THAN ONE WRIT MAY BE ISSUED. — More than one writ of execution may be issued at the plaintiff's cost, though the first be not returned; and when a fieri facias is returned not satisfied, or satisfied only in part, an alias fieri facias may be issued."

In holding the above, I am treating the decree as a single decree or judgment. In fact, that is what it is, even though its terms are met by payments in monthly installments.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Woolsey Finnell,
Tax Collector,
Tuscaloosa County,
Tuscaloosa, Alabama.

Ad Valorem Taxes — Exemption —

Rising Virtue Lodge No. 4, Ancient Free and Accepted Masons,
is exempt from taxes on Masonic Temple.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 22, 1938, in which you request my opinion as follows:

"During a period of many years Rising Virtue Lodge No. 4 A. F. & A. M. (of Tuscaloosa, Ala.) a chartered Masonic Lodge, operating under the Most Worshipful Grand Lodge of Ancient Free and Accepted Masons of Alabama has been paying ad valorem tax on a Masonic Temple which is the property of said Rising Virtue Lodge No. 4 A. F. & A. M.

"This Masonic Temple is a three story brick building. The third floor is used for lodge rooms. The first and second floors are rented, rents collected and after the operating expenses of the building have been deducted, the balance of the revenue received is used for charitable purposes only.

"Rising Virtue Lodge No. 4 A. F. & A. M. claims that it is exempt from tax."

In view of the recent opinion of the Supreme Court of Alabama in **Ware Lodge No. 438, Ancient Free and Accepted Masons, v. Harper**, 182 So. 59 (Advance Sheet, Southern Reporter), you are advised that Rising Virtue Lodge No. 4, A. F. & A. M., is exempt from the payment of any ad valorem taxes on the property which you describe and which is used as detailed in your inquiry.

In the Ware Lodge case, the subject under controversy belonged to a subordinate lodge of Masons at Alexander City, Alabama, and consisted of a lot and a three-story building, the third story of which was used for lodge purposes, the first and second stories being used for commercial purposes, and rents accruing therefrom being used, after paying the expenses of the lodge, for charitable purposes. The Court held that the Act of December 9, 1859, as amended by an act approved December 17, 1875, incorporating the Grand Lodge of Free and Accepted Masons of Alabama and the subordinate lodges under its jurisdiction, granted an exemption from taxation to the lodge as a charitable institution, and that the exemption constituted a "vested right" which could not be summarily taken from the lodge by a subsequent statute enacted by the Legislature, and further that the building owned by said Lodge was exempt from taxation and that the subordinate lodge was entitled to recover the taxes paid under protest on the building.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. J. J. Sibley, Chairman,
Lawrence County Board of Education,
Mount Hope, Alabama.

Officers — Schools —

County Board of Education may execute a lease of property under its control, which it otherwise has authority to lease, for a term extending beyond the term of the present incumbent members, if said lease is made for a valid consideration and in good faith.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 26, 1938, which is as follows:

"As chairman of the Lawrence County Board of Education, I wish to ask for your official opinion on the question explained in the succeeding paragraphs. It shall be very grateful for a reply at your earliest convenience.

"The late C. C. Smith, until his death a citizen of Lawrence County, Alabama, bequeathed valuable property, including some farm land, to the State of Alabama. The income from this property, according to the terms of the will, was to be used for the benefit of a school known as C. C. Smith School. The State Department of Education administers the property through the Lawrence County Board of Education, reserving the right of final action on any decision the latter makes.

"Heretofore the land has been rented for a period of only one year at a time. This year two men now members of the County Board but defeated for reelection to another term have moved officially to have the Board rent the land to the present tenants for a period of five years. The terms suggested are the same as those of the now existing contracts, which do not secure a fair return to the beneficiary. The terms of office of the two members in question expire on the last Friday in November, 1938.

"The question in point is whether the County Board of Education, with the approval of the State Board of Education, can legally execute a contract to rent the land for a period of five years, while the two defeated but still official members are in office, thus preempting the rights of the Board which is soon to have two new members."

In answer to your inquiry, I am of the opinion that a County Board of Education may execute a lease of property under its control, which it otherwise has authority to lease, for a term extending beyond the term of the present incumbent members, if said lease is made for a valid consideration and in good faith. The fact that a lease extends beyond the term of the present members of the Board of Education would not invalidate same. The contract is a contract of the board and not of the individual members thereof.

In dealing with the question of the authority of school boards to bind their successors, 56 C. J. 485, Section 514, states as follows:

"Section 514. POWER TO BIND SUCCESSORS. Although it has been said that a public school board or officers cannot enter into a school contract so as to limit the discretion of their successors, contracts which were valid when made are binding on the successors of the board or officers making them, except where the contract is not for a necessary matter, or is for an unreasonable length of time, or where fraud attaches. Where district officers are permitted to hold office until their successors are elected and qualified, such officers may bind the district by a lease of a building for a school, even though the lease was entered into subsequent to the election of their successors but prior to qualification by such successors. **A valid lease may be made which extends beyond the term of office of the members of the board executing it,** but where the board is given discretion by statute to determine the particular classes to be taught, a contract to maintain a particular class in the building for a period beyond the term of office of the members executing it is voidable by their successors." (Italics supplied).

In the recent case of *Corning et al vs. Patton*, (MS.) our Supreme Court held that a county governing body may lease county property for a term extending beyond the term of incumbent members of said body, if said lease is made for a valid consideration and in good faith. Such a lease is binding on the county. See also *Board of Revenue Shelby County vs. Farson, Son & Company*, 197 Ala. 375, 72 So. 613. Although these cases dealt with county property, the same principle is applicable to property under control of a County Board of Education.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. Frank N. Julian,
Compensation Commissioner,
Workmen's Compensation Division,
Bureau of Insurance,
Montgomery, Alabama.

August 18, 1938

Workmen's Compensation — Waiting period — Code Section 7566.

Where after working approximately one-half of a regular day, an employee sustains a compensable injury, the day on which the injury occurred shall be included in determining whether the disability existed for a period as much as four weeks, as provided in Section 7566 of the Code.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I wish to acknowledge receipt of your letter of June 9, 1938, with reference to the waiting period provided by Section 7566 of the Code, quoting your ruling of June 27, 1927, as follows:

"The day of the injury shall be taken as the first day of disability, regardless of the hour of the injury, and, therefore, the fourteen day waiting period shall include the day of the injury."

and state following facts:

"A person was injured January 1. He was able to return to work January 29. Days disabled — 28. Based on maximum compensation of \$18 per week, the injured employee is entitled to \$72.00

"But the employer paid the employee for approximately one-half day (the time actually worked before the injury) for the day on which injury occurred, and excluded that day from the count of the waiting period. He names the following day, January 2, as the beginning of disability, making a period of 27 disability — not being 'as much as four weeks.' After deducting the waiting period of 14 days there would remain only 13 days for compensation, entitling him to \$33.42."

You ask whether your ruling of June 27, 1927 is a correct interpretation of Section 7566 of the Code, as applied to the instance you mention. In my opinion, your ruling is correct as applied to the facts stated.

In pertinent part, Section 7566 of the Code provides:

"Section 7566. * * * Compensation shall begin with the third week and in event the disability from the injury exists for a period as much as four weeks, compensation for the first two weeks after the injury shall be added to and payable the first installment due the employee after the expiration of the four weeks."

This particular question has not been decided by our Supreme Court, nor have I found a decision upon the question by any other court of last resort. Bearing in mind, however, that the act should receive a "liberal construction" (*Mobile Liners, Inc. v. McConnell*, 220 Ala. 526) and that "all doubts as to right to compensation being resolved in favor of employees" (*National Cast Iron Pipe Co. v. Higginbotham*, 216 Ala. 129), it is my opinion that the fair intent of the law is that the day on which the compensable injury occurs shall be included in determining whether the duration of disability exists for as much as four weeks. The similar provisions of the original Federal Act were so interpreted and applied. 1 *Honnold, Workmen's Compensation*, 651; *In re Taylor*, Op. Sol. Dept. Labor, 542; *In re Fogg*, Op. Sol. Dept. Labor, 509.

It is, therefore, my opinion that your ruling of June 27, 1927 is a correct interpretation of the law as applied to the facts you recite.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Bonds — Section 2603, Code of Alabama, 1923, does not apply to a Register in Chancery.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Please give me your opinion as to whether Section 2603 of the Code of 1923 creates a lien on the property of the Register in Chancery."

Your question must be answered in the negative. Section 2603, Code of Alabama, 1923, provides in part as follows:

"Bond a Lien. — The bond of the judge of the probate court, of the county clerk, of the sheriff, of the clerk of the circuit court, of the tax assessor, of the tax collector, and of the county treasurer, is a lien upon the property of the principal from the date of its execution: * * * "

This section has remained substantially unchanged through the Codes of 1876, 1886, 1896, 1907 and 1923, and it is my opinion that a Register in Chancery cannot be included in this section either directly or by implication. This section provides in the main a penalty and it is axiomatic that as such the provisions of the law must be strictly construed.

This holding is to be distinguished from the opinion of this office found in **Quarterly Reports of Attorney General**, Vol. XI, p. 120, wherein I held that Section 6108, Code of Alabama, 1923, which provides that the clerks of all courts from which an appeal lies to the Supreme Court or the Court of Appeals, included by implication, a register of the circuit court in equity. But, in the section under consideration, you will note that the clerk of the circuit court is specifically mentioned and can therefore be distinguished from my previous opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Dr. J. N. Baker,
State Health Officer,
Department of Public Health,
Montgomery, Alabama.

Health — Procedure prescribed in State Board of Health regulations governing food establishments relative to closure of same sufficient to justify institution of closure proceedings.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 1, 1938, in which you request my opinion as follows:

"The State Board of Health Regulations Governing the Manufacture, Preparation, Display, and Sale of Foods, Confections and Beverages (of which a copy is attached), include the following section (pages 21-22).

"SECTION 11 — CLOSURE OF FOOD ESTABLISHMENTS AUTHORIZED, AND PROCEDURE PRESCRIBED

'Upon the date on which an uncomplained-with notice of pending suspension or revocation of a food permit takes effect, the health officer shall post a signed notice of such sus-

pension or revocation of permit and of closure of the establishment, upon the main entrance of the establishment affected. The form of the said notice shall be as follows:

Notice to the Public

'Because of failure of the operator of this establishment to comply with the regulations of the State Board of Health pertaining to its operation, the permit for the operation of this establishment has been suspended for a period of _____ days, (revoked), * making its continued operation unlawful.

"This action is taken in the interest of the public health.

Signed: _____

County Health Officer (or State Health Officer, or his legal representative). *

* Alternative wording.'

"As yet no legal action, such as is authorized in this section, has been taken. But several county health officers have expressed a hesitancy to institute such action because of shortcoming in the text of this section, in that no provision is made for serving a closing notice upon the manager of the establishment, thereby fixing his legal responsibility for compliance with the closing notice.

"Will you inform me whether this criticism of the verbiage of this section is justified, and, if so, suggest a text whereby the objectivity of this section is retained, and the ends herein suggested are included so that this section may be formally amended at the first opportunity. The approaching date of application of these Regulations makes it very desirable that health officers be fully implemented with the powers of this section."

In my opinion, the criticism of the verbiage of Section 11 which you suggest is not in any way justified, when Section 11 is read with Section 10, which section it is obviously intended to supplement. The two sections read as pertinent as follows:

"Section 10 — DECLINE OF RENEWAL, AND SUSPENSION OR REVOCATION OF FOOD PERMITS AUTHORIZED.

"The health officer is also hereby empowered to decline to renew, or to suspend or revoke any food permit already in effect, because of the frequently repeated or continuous violation of any provision of Sections 2, 3, or 4 of these regulations, after the expiration of a reasonable period fixed by the health officer for the correction or discontinuance of the said violation, set forth in a written notice to the said permit holder, in which notice the said violation is specifically named and the remedy prescribed; or, because of any condition, other than specific violation of any provisions of these regulations, which in the opinion of the health officer is attended with danger to the health of consumers of the food products made, sold, or served by the establishment in operation." (Emphasis supplied).

"Section 11 — CLOSURE OF FOOD ESTABLISHMENTS AUTHORIZED, AND PROCEDURE PRESCRIBED.

"Upon the date on which an uncomplished-with notice of pending suspension or revocation of a food permit takes effect, the health officer shall post a signed notice of such suspension or revocation of permit, and of closure of the establishment, upon the main entrance of the establishment affected. * * * " (Emphasis supplied).

You will note that Section 10 authorizes a health officer to decline to renew, or to suspend or revoke any food permit for the reasons given, after the expiration of a reasonable period set forth "in a written notice to the said permit holder." Section 11 then provides that should such permit holder fail to comply with the law after such notice, then the health officer shall post the notice prescribed in Section 11 on the main entrance of the establishment affected.

The provisions of Section 10, in my judgment, when read in pari materia with Section 11, give ample authority for the proceeding to close an eating establishment whis has failed to comply with the provisions of Sections 2, 3, and 4 of the Regulations Governing the Manufacture, Preparation, Display, and Sale of Foods, Confections and Beverages, promulgated by the Alabama State Board of Health.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Grady R. Williams,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Adoption — Act of 1931, p. 504, amending Section 9302, Code of Alabama, 1923, held to be a substitute for Section 9302 and all proceedings for adoption must be had as provided in such amendatory act.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 4, 1938, in which you request my opinion as follows:

"Mr. Sol M. Levinson and his wife, Paula Levinson, citizens and property holders of this city, who have no children of their own, has applied to this Court for the adoption of Marcia Levinson and Irvine Levinson, both under twelve years of age and both being children of Mr. Levinson's brother, who lived and died in Europe. Both children were born in Europe. They were recently brought here by Mr. and Mrs. Sol Levinson from Europe on proper permits issued by the American Consul. The mother of the children is also dead, having died in Europe.

"Their attorney takes the position that the Amendment of Section 9302 Code 1923, by Act of 1931 page 504 pertaining to adoption of children as therein set out, does not cover this particular case, that the Act of 1931 did not repeal the old law or Section 9302 of the Code, but only amended it, and that the amendment covers only cer-

tain characteristics of cases where certain children are sought to be adopted. That the old procedure to adopt these children is all that is necessary, that it is a case that would not have to be referred to the Public Welfare Department under the Amendment to that Section of the Code, and await one year for a final decree.

"Please let me have your opinion on this matter."

In my judgment, the act appearing on p. 504 of the General Acts of 1931, amending Section 9302, Code of Alabama, 1923, now provides the method which must be followed in petitioning for adoption of a minor child. You will, of course, note that the Child Welfare Department and all of its activities has been transferred to the Public Welfare Department by an Act approved August 27, 1935 (Gen. Acts, 1935, p. 762).

Your attention is directed to the fact that the 1931 Act, *supra*, provides,

"That Section 9302 of the Code of Alabama 1923, be amended
so as to read as follows:

* * * "

It was clearly the legislative intent, in my opinion, that the provisions of the Amendatory Act should be substituted in toto for Section 9302 as then existing and that all procedure for the adoption of minor children should be had as provided in the Amendatory Act rather than in the original section. As stated in *Falconer vs. Roberts*, 46 Ala. 340, 348,

"A law is amended when it is, in whole or in part, permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete, or perfect, or to fit it the better to accomplish the object or purpose for which it was made, or some other object or purpose."

In the instant case, Section 9302 was amended by adding certain provisions which the legislature deemed necessary to better insure the welfare of the adopted child and you are therefore advised that all procedure in the case stated by you must be had under Section 9302 as amended by the Act of 1931, p. 504.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Bart B. Chamberlain,
Circuit Solicitor,
Mobile County,
Mobile, Alabama.

Solicitors — County may furnish telephone where solicitor maintains an office outside of the courthouse because of crowded condition therein regardless of whether or not said office rent is paid by the county.

Dear Sir:

This is to acknowledge receipt of your letter of July 23, 1938, which is as follows:

"I have before me a copy of your letter of July 16, 1933, to Honorable Charles W. Lee, State Comptroller, which is as follows:

'Board of Revenue of Mobile County has the authority to furnish a telephone to the solicitor where his office is in the courthouse or is rented for him by the county.

'By laws of 1933, Act 187, p. 201, it is provided,

"That Boards of Revenue or Courts of County Commissioners may designate which offices in the courthouse may have telephones installed therein."

'This has been interpreted (See opinions of Attorney General, Quarterly Report, Vol. II, p. 64) that where a solicitor has an office maintained for him in the courthouse, the Board of Revenue may furnish him with a telephone. This does not mean that where a solicitor maintains his private law office and at the same time acts as solicitor for the county that the Board of Revenue has the authority to furnish him with a telephone in his office. It is my opinion that if the Board of Revenue rents office space for the solicitor outside of the courthouse because of the crowded conditions therein, they would have the authority to furnish him with a telephone at the expense of the county.'

"I note your statement to the effect that in your opinion if the Board of Revenue rents office space for the Solicitor outside of the Courthouse because of the crowded conditions therein that they would have authority to furnish him a telephone at the expense of the County. As a matter of fact the Court House and County Building in Mobile is so crowded there is absolutely no unoccupied space which would be available for the Solicitor's office. I am satisfied from your opinion that under these circumstances the county board would have authority to pay office rent for me as Solicitor. In other words, there is no space available for the Solicitor's office in the County Building and I am occupying offices in the First National Bank Building and I feel that the County would be authorized to pay rent for the space necessary for the Solicitor. Under your opinion if the County Board would rent the space for me in this building because of the crowded condition of the county building the County Board would be authorized to pay for my telephone. I am paying my own office rent and it seems to me that the County would be authorized to pay for my telephone under the circumstances.

"I wish that you would please give consideration to this question and advise me whether or not in your opinion the mere fact that I pay my own office rent bars the county board from paying my telephone rent.

"I have just been notified by the County Board that the Board will not pay the rent of the telephone because of your opinion and it occurs to me that in view of the fact that there is no space in the County Building for the Solicitor's office if I should desire to have my office there, that the County should pay my telephone rent."

In answer to your inquiry, I am of the opinion that the county is authorized to furnish a telephone for the Solicitor where he maintains an of-

office outside of the courthouse because of the crowded condition therein. This is true regardless of whether or not the county pays said office rent.

In the opinion rendered to the State Comptroller on July 16, 1938, referred to in your letter, it was held that if the County Board of Revenue rents office space for the Solicitor outside of the courthouse because of the crowded condition therein, they would have the authority to furnish him with a telephone at the expense of the county.

In my judgment, this same principle is applicable if the solicitor has to maintain an office outside of the courthouse because of the crowded condition therein, regardless of whether or not the office rent is paid by the county. The criterion in such an instance is not who pays the office rent but the crowded condition of the courthouse.

Said opinion to the State Comptroller of July 16, 1938, is hereby modified to conform to the above.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Henry S. Long,
Chairman, State Tax Commission,
Capitol.

Motor Carrier Act — Mileage Taxes —

1. State Tax Commission not authorized to credit mileage tax currently due from taxpayer with prior overpayment of mileage tax by said taxpayer.

2. Taxpayer who overpays mileage tax due by him, because of a mistake either of law or of fact, may secure refund under provisions of Act No. 432, General Acts 1931, page 527, approved July 17, 1931.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Reference is made to a letter from J. S. Freeman, Chief Clerk of the Mileage Tax Department, to Hon. Bibb Folmar, Assistant, State Tax Commission, the contents of which you present for an opinion. The letter is as follows:

"Under decree rendered by Judge Jones, Circuit Court of Montgomery County, in the case of the Alabama Public Service Commission vs. Motor Terminal & Transportation Company, where a motor carrier was operating a truck with a trailer attached, the truck and trailer was considered as one unit and the rate of mileage tax was based on that unit as operated over the highways of the State of Alabama. The Motor Terminal and Transportation Company was operating under the 1931 Common Carrier Act.

"When I took over this department I assumed that the same method of classification would apply to operators operating with the same class of equipment under the 1932 Act and would come under

the same schedule for the purpose of paying mileage tax and I raised the rate for mileage tax from $\frac{1}{2}$ c to 1c per mile and collected on this basis.

"One, W. E. Jones, operating under the 1932 Motor Carrier Act, admitted that he was operating a motor tractor factory rating of $1\frac{1}{2}$ tons with an attached 6 ton trailer, protested paying on the basis of the tractor and trailer as one unit. This case was tried first before the Alabama Public Service Commission and this Commission sustained my contention. Jones appealed to the Circuit Court of Montgomery. The case was tried before Judge Carter of Montgomery County, Circuit Court. Judge Carter rendered a decision adverse to the State. The State appealed to the Supreme Court. This case has been pending since October in the Supreme Court but I noticed in the morning paper where the Supreme Court decided this case affirming the decision of Judge Carter.

"After Judge Carter's decision, on advice from the office of the Attorney General, I accepted payments on the basis of $\frac{1}{2}$ c per mile but wrote in the face of the audits or mileage tax reports "This payment accepted subject to correction after decision of the Supreme Court." I was of the opinion that we would win the case in the Supreme Court and in this way have claim on the operator for the balance of the taxes due.

"One operator has already refused to pay the current mileage tax claiming that he would have a credit with the State for the amount he overpaid at the rate of 1c per mile.

"I am of the opinion that this department has no authority to allow credits on that basis but that the proper proceedings for the operator will be to file a petition for a refund from the State Tax Commission on regular forms and in a manner as required by law. I look for a good deal of trouble along this line and will appreciate your taking up with the Attorney General this question and get a ruling as quickly as possible as to how this overpayment as a claim should be handled."

Under the facts stated in the letter, the taxpayer has heretofore overpaid the mileage tax due by him because of a mistake of law.

There is no legislative authority for you to credit the amount of this overpayment to the mileage tax currently due by said taxpayer.

However, the taxpayer is not without recourse. He may apply for a refund of the tax so overpaid by him, in accordance with the provisions of Act No. 432, General Acts 1931, page 537, approved July 17, 1931. You will note that the procedure there outlined provides that in such a case the taxpayer shall make application for a refund of the tax so overpaid by him within twelve months from the date of such overpayment. No overpayment made by him more than twelve months from the date on which he makes application for a refund can be refunded under the provisions of said act. *Lee v. Cunningham*, 176 So. 475.

Sections 379-80 of Chapter 2 of Article 14 of the 1935 Revenue Act provide the method by which a taxpayer paying taxes under protest, other than ad valorem taxes, may recover the same. However, as I understand your inquiry, this mileage tax was not paid under protest, and these sections

would not apply. Be that as it may, the taxpayer could pursue the remedy prescribed in the 1931 act, supra, regardless of whether or not he paid said tax under protest.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938

Hon. Frank N. Julian,
Superintendent of Insurance,
State Capitol,
Montgomery, Alabama.

Dear Sir:

This office is in receipt of your letter of July 18th and your letter of July 21st requesting an opinion as to whether:

(1) Lloyds America, a Lloyds organized under the State of Texas, chartered to write insurance other than life, is required to have a deposit of \$200,000 with the financial officer of some state before it can be admitted to write insurance, other than life, in the State of Alabama.

(2) If it is not required to have a deposit of \$200,000, does the certificate of the Board of Insurance Commissioners of the State of Texas, referred to in your letter, in connection with the deposit agreement referred to in your letter, a copy of which is attached to your letter, entitle it to a license in the State of Alabama under Section 8351 of the Code, assuming that all other requirements of our statute have been complied with.

(3) Under the deposit agreement must a guaranty fund of \$100,000 be maintained at all times, and does the said fund stand behind policies issued so long as Lloyds America continues in business, for the protection of all of Lloyds policyholders, and if so, do the Alabama policyholders stand on equal terms with those of other states.

(4) Unsecured underwriters demand notes receivable amounting to \$299,534.91 should be allowed as part of the assets of Lloyds America.

After consideration of the questions propounded, you are advised as follows:

1. Under Section 8360 of the Code of 1923, a Lloyds organization with a paid-up cash capital may be authorized to transact the business of insurance other than life, in this state, in like manner and upon the same terms and conditions as are required of and imposed upon insurance companies regularly organized. If a Lloyds does not have an actual paid-up cash capital, then it is required to make the deposit of \$200,000 provided for in Section 8355 of the Code.

2. It appears from your letter that Lloyds America has a paid-up cash capital of \$100,000, which has been invested in certain securities that are on deposit with the Insurance Department of the State of Texas. The requirements for admission into Alabama for insurance companies, other than life, and for a Lloyds with a paid-up cash capital under Section 8351 of the

Code are (a) It must have a paid-up cash capital of not less than \$100,000; (b) At least \$50,000 of that capital must be invested in state bonds or United States bonds or notes secured by mortgages on real estate for double the amount to be certified as worth at least \$50,000 by the Insurance Commissioner of the State in which the company is organized, reckoning the same at their current market value; (c) Or, in lieu of the cash capital stock, such company shall have and maintain a surplus above all liabilities including re-insurance reserve of not less than \$100,000. An examination of the deposit agreement between Lloyds America and the Board of Insurance Commissioners of the State of Texas and the certificate of deposit with the Insurance Department of the State of Texas discloses that its deposit with the Insurance Department of the State of Texas complies in every respect with the provisions of Section 8351 of the Code. The statutes make a certificate of the State in which Lloyds America is organized conclusive so far as the mortgages are concerned. The statute does not attempt to specify how the remainder of the capital shall be invested. It may be invested in any way so long as the capital is not impaired. The deposit agreement obligates Lloyds America to maintain the value of the securities at all times at a sum not less than \$100,000 in good, acceptable and admissible securities, that is, securities acceptable and admissible in Texas. So long as \$50,000 of that amount is maintained on deposit in the State of Texas in securities admissible under the statutes of Alabama, it is my opinion that the remainder of the capital may be invested in securities that are admissible in the State in which the deposit is made.

By the terms of the deposit agreement, the deposit with the Insurance Department of the State of Texas cannot be terminated nor the securities deposited surrendered until after the discharge of all liabilities of Lloyds America to all of its policyholders in accordance with the terms of its policies issued to the full satisfaction of said Board of Insurance Commissioners of Texas and to the satisfaction of the Insurance Commissioners of the respective states in which Lloyds America may do business.

3. It is, therefore, my opinion, and I so advise you that Lloyds America is not required to have a deposit of \$200,000 before it can be permitted to write insurance other than life in the State of Alabama. The certificate of the Board of Insurance Commissioners of the State of Texas referred to and quoted in your letter, copy of which has been examined, together with the deposit agreement, entitles Lloyds America to a license in the State of Alabama, assuming that the other requirements of the statutes of Alabama have been complied with. Under the deposit agreement, the deposit with the State of Texas must be maintained at all times in a sum of not less than \$100,000 in good, acceptable and admissible securities and \$50,000 of that amount must be in securities admissible under Section 8351 of the Code of Alabama. That sum stands behind the policies issued so long as Lloyds America continues in business for the protection of all Lloyds policyholders and the policyholders in Alabama stand on equal terms with those of other states.

4. With reference to the unsecured, underwriters demand notes receivable, you are advised that Section 8347 of the Code by its express language refers to and is limited to "stockholders' obligations". The demand note of underwriter in a Lloyds organization is not a "stockholder's obligation." A Lloyds organization does not and cannot, in the very nature of things, have stockholders. There is a very definite and marked distinction between a "stockholder's obligation" and the engagement of an underwriter at a Lloyds. The legislature has not included a Lloyds organization in Section 8347 of the Code, which apparently is aimed at life insurance corporations; and there

is no authority for extending the provisions of the statute by construction. In addition, you have been kind enough to furnish this office with two opinions of the Attorney General of the State of Texas, one dated May 11, 1938, and the other dated May 27, 1938, in which the Attorney General of the State of Texas has given an official opinion to the effect that the unsecured notes of the underwriters at Lloyds America may be used as a part of their gross assets for the purpose of determining whether or not Lloyds America has net assets in compliance with the statutes of the State of Texas.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 19, 1938

Hon. R. S. Duck, Register and Clerk of the Circuit Court,
Baldwin County,
Bay Minette, Alabama.

1. Under the schedule of fees of the County Court there is a charge of fifty cents for making order of continuance. This order must be made by the judge, and if he fails, the clerk is not responsible for same and it cannot be charged against him.

2. Under Section 3739, Code of Alabama, 1923, the clerk is allowed a fee of twenty-five cents for each continuance. This is a fee that goes to him individually, and if he fails to charge and collect the same, it is his loss and no concern of the State and County.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 5, 1938, in which you request my opinion as follows:

"I wish you would immediately furnish me an opinion on the following matter:

"(1) Section 3758 of the 1923 Code of Alabama provides, among other things, the following fee: 'For each order of continuance \$.50.' There are a number of cases in County Court here that have been passed from term to term in which there was no order of continuance. In an examination of my books and records as Clerk of the County Court, am I chargeable with this fee in such cases?"

"(2) In Section 3739 of the 1923 Code of Alabama the following fee is provided: 'For each continuance \$.25.' There have been cases in the Circuit Court of Baldwin County, Alabama which have been continued by merely being passed without any order of continuance being made. In examination of my office as Clerk of the Circuit Court, am I chargeable with this fee?"

Answering your first request, the fees that are taxable under Section 3758, Code of Alabama, 1923, are fees of the county court, and the fee of fifty cents is for an order of continuance. This order is made by the judge of the county court. You, as clerk, have nothing to do with this, and if the judge fails to make the order it is his mistake and not yours, and you cannot be charged with the same as clerk of the court.

Relative to your second request as to the fee of twenty-five cents for each continuance, allowed under Section 3739, Code of Alabama, 1923, you will note that this is a fee that goes to you individually for entering an order of continuance after the judge has made such an order. Of course, you, as clerk, cannot enter an order of continuance unless the judge first makes the order. However, as this fee is payable to the clerk individually, it is not chargeable one way or the other. If you do not charge it up and collect it, it is your **personal** loss and it is no concern of the State and County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 19, 1938

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Exemptions — Property owned by the Presbyterian Home for Children, a charitable organization is not exempt from ad valorem taxation, although the income from said property is used for charitable purposes.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 12, 1938, in which you request my opinion as follows:

"The Presbyterian Home for Children, located at Talladega, is owner of a number of pieces of property in Jefferson County on which there is an income from rentals, all of said income being devoted entirely to the Presbyterian Orphan's Home at Talladega.

"They are asking that this property be exempted from taxation but inasmuch as your opinion addressed to me on June 12, 1936, regarding the Methodist Orphanage at Selma seems to parallel this case, I have turned said down. This opinion is on page 115 of Vol. No. 3, your quarterly report. I believe the only difference is the following paragraph of their letter which reads as follows:

"The Presbyterian Home for Children was chartered by the General Assembly of Alabama by an act approved March 3, 1870 under the name of 'The Orphans' Home of the Synod of Alabama'."

"which reads in part

"And all of the property of said organization should be exempt from taxation."

"An early opinion would be appreciated."

In my opinion, the property concerning which you inquire is not exempt from ad valorem taxation.

Upon examination I find that the Presbyterian Home for Children was granted a charter by the General Assembly of Alabama in an Act approved

December 12, 1864, (Acts of Alabama 1864, page 108) under the name of "The Orphans' Home of the Synod of Alabama."

While this act of incorporation was enacted under the authority of the Constitution of Alabama of 1819, which Constitution did not engraft on acts chartering private corporations liability to alteration and revocation by the Legislature for the public good, it contained no exemption from ad valorem taxation or any other form of tax. In an amendment approved March 3, 1870, (Acts of Alabama 1869-70, page 296) it was provided that " * * * all the property of said corporation shall be exempted from taxation." This grant of exemption from taxation was given under the Constitution of 1868.

Section 1 of Article XIII of the Constitution of 1868 engrafted on acts chartering private corporations liability to alteration and revocation by the Legislature. Section 1 provides as follows:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered, amended or repealed."

The grant of the charter to the Orphans' Home of the Synod of Alabama, which is, as stated in your letter, now the Presbyterian Home for Children, containing the exemption from taxation effected a contract between the State and the corporation which was valid and binding as it was not altered, amended or repealed. See *State of Alabama v. Alabama Bible Society*, 134 Ala. 632, 634. *Opinion of the Attorney General, Quarterly Report, Vol. 3, page 155.*

It is true that in the recent case of *Ware Lodge No. 435, etc. v. Harper*, 182 So. 59, 63, the Supreme Court stated, "The State Constitutions of 1819 and 1868 did not engraft upon acts chartering corporations the liability to any alteration or revocation," but this statement cannot be conclusive inasmuch as it is apparent that the Court must have overlooked Section 1 of Article XIII, supra. The Presbyterian Home for Children cannot, therefore, in my opinion, avail itself of the statement in the *Ware Lodge* case in order to secure an exemption from ad valorem taxation.

It being settled, therefore, that the Legislature may constitutionally alter the charter granted the corporation in question and deprive it of the exemption contained in the grant, your attention is directed to Act No. 194, H. B. 324, approved July 10, 1935, (General Acts, 1935, page 257) which provides as follows:

"Section 2. * * * All property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes; * * *"

Section 374 of said Act No. 194 provides:

"The exemptions from ad valorem taxation granted in this act are hereby declared to be exclusive and any laws or parts of laws,

general, special or local, granting or attempting to grant any exemption from ad valorem taxation, except as in this case provided, are hereby specifically repealed."

In my opinion, the effect of the foregoing provisions of Act No. 194 is to specifically repeal the grant of exemption from ad valorem taxation contained in the amended charter of the corporation here under discussion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 20, 1938

Hon. Daniel T. McCall, President,
Mobile County Revenue & Road Commrs.,
Mobile, Alabama.

Mobile County — Board of Revenue and Road Commissioners.

(1) The Board of Revenue and Road Commissioners of Mobile County legally may authorize the employment of labor and the purchase of materials and supplies in furtherance of the construction and maintenance of public roads, and audit and allow claims therefor, notwithstanding the fact that bids therefor were not procured by the Superintendent of Public Roads and submitted to said Board prior to such employments and purchases, as is provided by Section 3, Local Acts 1907, p. 727; and it is the duty of the President of said Board to draw warrants upon the County Treasury in payment thereof.

(2) General Acts 1920, p. 124, do not repeal Local Acts 1907, p. 727.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Under authority of Local Acts of Alabama 1907, pages 727-735, the Board of Revenue and Road Commissioners did employ a Superintendent of Maintenance on November 27th, 1934, as prescribed in Section 2 of said Act.

"Your attention is invited to Section 3 of this Act, which in part is as follows: 'He shall have power and authority to hire such number of laborers as may be provided by the Board; to discharge the same; to purchase all stock, machinery, tools and supplies under bids submitted to and approved by said Board.'

"As President of the Board of Revenue and Road Commissioners, I have on several occasions refused to sign warrants covering wages of employees of the Road Department and also warrants covering payments for supplies and materials that were purchased, due to the fact that Section 3 of this Act had not been complied with.

"An Act was passed, see Local Acts of Alabama, 1920, Special Session page 148; to elect a road engineer. In view of the fact that

the Board did not employ a road engineer, but did employ a Maintenance Superintendent, it is my contention that the Superintendent of Maintenance comes under the authority of an Act passed 1907, Local Acts of Alabama and does not come under the authority of the 1920 Act.

"1. Am I within my rights to refuse to sign warrants that fail to comply with Section 3, Local Acts of Alabama, 1907?

"2. Are claims that do not fully comply with Local Acts of Alabama, 1907, legal claims against the County?

"3. Does the Act of 1920 repeal the Act of 1907 wholly or in part, only, if in part, what sections?"

In reference to your first inquiry, I refer you to Section 321 of the Code, which provides in part as follows:

"Such officer signing such warrants shall be liable for the amount of any warrant drawn and paid by such depository without the authority of law."

So that, notwithstanding the fact that a warrant may have been ordered drawn by the Board of Revenue, yet should you sign this warrant and the same be issued without any authority of law, you would be liable on your official bond. See **Opinion of Attorney General, Quarterly Report, Vol. XI, p. 91.**

Section 3 of Local Acts, 1907, p. 729, provides in the part applicable to the Superintendent of Public Roads (who is referred to in your letter as "Superintendent of Maintenance":

"He shall have power and authority to hire such number of laborers as may be provided by the Board; to discharge the same; to purchase all stock, machinery, tools and supplies under bids submitted to and approved by said board;"

Section 1 of said Local Act provides that "the entire control, management and supervision of public roads in the County of Mobile * * * are hereby lodged and vested in the board of revenue and road commissioners of Mobile County and said board shall have full and complete authority to provide for the repair, maintenance and improvement of the same, * * *".

In my opinion it was not the legislative intention to withdraw from the county governing body any of its plenary authority and powers relative to public roads and to lodge those so withdrawn in the Superintendent of Public Roads. The purpose of the statute was to provide that the Superintendent of roads should make the investigation as to the necessity for the employment of labor and for the procurement of materials, etc., to investigate the prices, terms and conditions upon which the same might be procured, and to make report of his findings to the county governing body. In my opinion the ultimate responsibility, for the purchase of materials and supplies and for the employment of labor rests upon the county governing body. — cf. *Thompson v. Chilton County*, 181 So. 701, (Ad Sheets).

Your inquiry does not point out in what manner the employment of labor and the procurement of supplies have been effected in violation of Section 3 of the Local Act. I assume that, as to the purchase of supplies and materials, noncompliance with the provisions of Section 3 consisted of

failure to have the superintendent obtain bids and submit the same to the county governing body. However, it is my opinion that such noncompliance does not affect the validity vel non of the action of the Board in auditing and allowing claims based upon the purchase of such materials and supplies. The provisions for obtaining of bids by the road superintendent are for the purpose of giving the county governing body information upon which its members may base their decisions in making purchases and in auditing and allowing claims therefor. If the county governing body acts without the benefit of this information, its orders authorizing purchases and auditing and allowing claims therefor are legal and valid nevertheless.

In this connection, out of an abundance of precaution, I direct attention to that provision of Section 3 that "no contract shall be let for more than one hundred dollars (\$100.00) except by calling for bids and awarding the same to the lowest and best bidder." In my opinion, this provision is not applicable to purchase of materials and supplies to be used upon the county roads, nor to the employment of labor therefor. It is applicable only to contracts for county road projects, for example the construction of bridges, culverts, etc.

So that, answering your first question in the light of the interpretation I have put upon the same, it is my opinion that if the county governing body audits and allows claims for the employment of labor and the purchase of supplies in furtherance of the construction or maintenance of public roads of the county, and audits and allows claims therefor, it is the your duty to sign warrants in payment thereof, albeit the Superintendent of Roads did not submit to the county governing body bids for the same, and although the county governing body acted in making such employments and purchases with out the benefit of the information which may have been contained in such bids, if supplied to them.

In view of my answer to your first inquiry, the necessity for answering your second inquiry is dispensed with.

By General Acts of 1920, p. 148, all counties in the State having a population of over eighty thousand and under two hundred thousand are directed to elect a road engineer for such counties. This Act applies to Mobile County, since Mobile County, comes within the population classification as stated. The powers of the county engineer are set forth in Sections 4 and 6 of this Act and provides as follows:

"Section 4. That the said county engineer, herein provided for, shall have entire charge of the public road, highways and bridges in the county in which he holds office, he shall employ such assistants and help as is necessary for a full and satisfactory performance of the duties of his office, relative to the upkeep, maintenance, construction, etc., of all roads, highways and bridges in the county in which he holds office.

"Section 6. That the said road engineer shall have charge of all county convicts and all other help worked on the public roads, highways and bridges in the county in which he holds office."

The powers of the Superintendent of Public Roads are set forth in Section 3, Local Acts 1907, p. 729, and provides as follows:

"He shall have power and authority to hire such number of laborers as may be provided by the board; to discharge the same; to

purchase all stock, machinery, tools and supplies under bids submitted to and approved by said board; the entire supervision and management of the convict camps, the employment of all guards therefor prescribed and approved by said board, * * * "

You will note that the duty of the Superintendent of Roads in reference to convict camps and laborers on the public roads was vested by the laws of 1920 in the county engineer, but that the other duties of the Superintendent of Roads remain with him. It is my opinion that the Act of 1920 does not repeal the Local Act of 1907, but that the duties of the Superintendent of Roads with reference to the convict camps and the laborers to be employed on the public roads were taken from him and vested in the county engineer (if, as and when elected) by the county governing body. Since you advise me that the Board of Revenue and Road Commissioners of Mobile County do not employ a road engineer, but continues to employ a maintenance superintendent of roads, it is my opinion that he would continue to discharge the duties as set forth in the Local Act of 1907 and that he would be governed by the provisions of said Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 20, 1938

Hon. Daniel T. McCall, President,
Mobile County Revenue and Road Commissioners,
Mobile, Alabama.

Mobile County — Board of Revenue and Road Commissioners.

1. Failing to conform to the uniform system of accounting pursuant to laws of 1935, p. 43, does not invalidate claims against the county for purchases made, which are otherwise valid.
2. Violations of the Uniform System of Accounting and Reporting are punishable pursuant to Section 4, Gen. Acts, 1935, p. 43.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Local Acts of 1907, page 727, section 2; authorizes the Board of Revenue to employ a superintendent of public roads. Section 3 of said act defines his duties: 'He shall have power and authority to hire such numbers of laborers as may be provided by the board; to discharge the same; to purchase all stock, machinery, tools and supplies under bids submitted to and approved by said board;'

"On November 27, 1934, recorded in minute book twenty-nine, page 252, this board employed a superintendent of maintenance, who has been retained in this capacity up-to-date.

"Purchases for the county road department have not been made in accordance with the provisions of said act as outlined above.

"An act passed in 1935 to establish a uniform system of accounting for each county, same to become effective by October 1, 1936, as provided in section 3 of said act. A system was installed for this county as of October 1, 1936, and has been operating since. All purchases by the board have not been made strictly as set out in the uniform system, but the system has been followed in a general way, and I have signed many warrants for purchases knowing that the system was not being carried out to the letter, thinking, however, that time would correct all flaws in the manner of county purchases. Some several months ago I made an investigation relative to purchases for the road department; I was dumbfounded to learn that purchases were being suppressed; no order numbers being issued for said purchases; therefore no record was made on the books of the county acknowledging the liability of the county as to these purchases. The whole procedure was to show that the road department was being operated on a cash basis, when in fact they were running far behind, to the sum of \$35,000.00 as now known. (Further investigation is now being made to ascertain the definite amount).

"I have refused to sign warrants covering these purchases as I feel that they are not legal obligations of the county and that all parties connected in any way with the act of making these purchases any suppressing the recording of same from the county records are guilty of violating the uniform system of accounting as provided for in section 4, page 44, Acts of Alabama, 1935.

"It would have been impossible to get a correct financial statement from the books of the Board of Revenue and Road Commissioners of Mobile County, Alabama, with such a condition existing.

"Am I within my rights in refusing to sign warrants covering said suppressed purchases?

"What action can be taken against violators of the Uniform System of Accounting and Reporting, and by whom should action be instituted?"

In an opinion requested by you of recent date, I advised you that as President of the Board of Revenue, it was your duty to sign warrants ordered to be drawn by the Board of Revenue, but that, you could refuse to sign a warrant which was not a legal claim against the county.

By General Acts of 1935, p. 44, a uniform system of accounting was set up. The purpose of this act was to make the bookkeeping uniform in each county of the state so that an audit of these books could be made more easily by the Comptroller. The fact that as regards purchases made for supplies for the road department, the uniform system was not carried out because there was no recording of these purchases as the Uniform Accounting Act requires, is not controlling as to whether or not these claims are legal claims against the county. If, as you state, these purchases have not been made in accordance with the provisions of the law governing the same, then, in that event, these claims would not be legal charges against the county and you might properly refuse to sign these warrants. However, if these purchases were made in accordance with the law governing the same, i. e., that they were authorized or ratified by the county governing body and were commodities or items which the county road department required, but no bookkeeping entries were made in accordance with the uniform sys-

tem of accounting, then, it is my opinion that these claims are legal claims against the county and the warrants must be signed by you; as the failure to conform to the Uniform System of Accounting does not affect the validity of the claims.

In reply to your second inquiry, I refer you to Section 4, General Acts, 1935, p. 43, which provides as follows:

"Section 4. That any County Officer violating any of the provisions of this Act shall be guilty of a misdemeanor and on conviction shall be fined not less than \$50.00 (fifty dollars) nor more than \$500.00 (five hundred dollars). A continued failure and/or refusal on the part of such officer, to comply with the provisions of this Act shall subject such officer, as a liability on his official bond for neglect of duty, to a penalty of not less than \$50.00 (fifty dollars) nor more than \$100.00 (one hundred dollars) per month for the period of such failure."

I express no opinion as to the constitutional validity of Section 4, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1938

Hon. J. R. White, Chairman,
Board of Revenue of Walker County,
Jasper, Alabama.

County Commissioners — Section 230, Code of Alabama, 1923, — control of county property — right of Board of Revenue of Walker County to make donation to the Junior College of Walker County.

(1) Board of Revenue of Walker County is without legal authority to lease idle property to the Junior College of Walker County at a nominal consideration.

(2) Board of Revenue of Walker County has legal authority to lease idle property to Junior College of Walker County at an annual rental of \$400.00 to \$500.00, provided such sum, in the judgment of the Board, is a fair and reasonable annual rental for such property.

(3) Board of Revenue of Walker County is without legal authority to appropriate money as an aid to the conduct and operation of the Junior College of Walker County, which is an educational institution, public in its nature, but not a part of the public school system of the State of Alabama.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Plans are now on foot to open a school in Walker County to be known as the Junior College of Walker County. It has been proposed to this Board that we give to the Junior College of Walker

County a lease for a period of ten years on the property owned by the county and formerly used as an alms house. The lease will be executed for a nominal consideration.

"This Board feels that it will be of great benefit to the county to have a junior college established here and it is our desire to execute this lease if we can legally do so. We will thank you to render an opinion advising if the county can execute a legal, valid and binding lease for a period of ten years to the Junior College of Walker County for a nominal annual consideration."

This office requested information from you as to the amount of the nominal consideration which the Junior College of Walker County proposed to pay Walker County as rental for the property mentioned in the foregoing inquiry. In response to that communication, we have received a letter from Hon. W. W. Bankhead, which I presume was written at your request, and from which I quote as follows:

"Mr. J. R. White, Chairman of the Board of Revenue of Walker County, has referred to me your letter of July 7. You ask the amount of the nominal consideration which the Junior College of Walker County proposed to pay the county as rental for the property which the county desires to lease to the college. No specific consideration has been agreed upon, but it was to be a very small amount, for instance, \$25.00.

"If there is a serious question in your mind as to the validity of the lease given by the county for a nominal consideration, then you might give consideration to the question of whether or not the county could execute a lease on the property for a consideration of around \$400.00 or \$500.00 per year, and at the same time agree to give the school the same amount of money which is called for by the lease. If the county could legally make donations to the school, which is, in turn a public institution, then we could get around the question of the nominal consideration in the lease by arranging for the Board of Revenue to make an annual appropriation to the school.

"We much prefer, however, getting an opinion from you as to the validity of the lease for nominal consideration if you find you can render such an opinion. It will make it more difficult for the Junior College if we are unable to give them a lease on the property for the nominal consideration proposed."

In my judgment the Board of your county is not legally authorized to rent the property to the Junior College at and for the consideration mentioned in the letter from Mr. Bankhead, as such an amount is merely nominal and is not commensurate with the fair and reasonable rental value of said property, as I interpret the information given to me by you and Mr. Bankhead. The leasing of the property at such a small amount would be tantamount to a gift of a fair and reasonable rent which should be charged and collected. The electorate of the State of Alabama frowned upon such a proposed transaction when they approved the Constitution of 1901, and specifically Section 94 thereof which reads as follows:

"The legislature shall not have power to authorize any county, city, or town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual.,

association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

If the college proposes to pay unconditionally an annual rental of \$400.00 or \$500.00, your Board would be legally authorized to accept said sum as rent for said property, provided they are of the opinion that this amount is substantial, and is a fair and reasonable annual rental for said property.

Our Supreme Court in the case of *Corning, et al vs. Patton*, 182 So. 39, had under consideration the legal authority of the County Commission of Jefferson County to lease for a long time the site of the former courthouse. Chief Justice Anderson, writing the opinion for the court, said as follows:

"This question has heretofore been presented to this court and was considered and decided in the case of *Jackson v. Ball et al.*, Board of Revenue, 211 Ala. 273, 100 So. 327, wherein we held, under the facts outlined, that the board had the necessarily implied power under the general authority of control to rent or lease this identical property within legal limitations. Meaning, of course, subject to the restrictions and requirements of leases of real estate, having specially in mind Section 6923 of the Code of 1923, Section 3418 of the Code of 1907, limiting the period and requirements as to the execution of same. We will also add that the original record in this *Jackson v. Ball Case*, supra, has been examined and the bill charges that the lease there considered was a 'long time' one. True, this case was based on Section 130 of the Code of 1907, now Section 209 of the Code of 1923, and was decided prior to the Jefferson County Act, Local Acts, Extra Session, 1932, Page 84. But said act does not limit the authority of the commission as to the control of county property as it existed when the *Jackson v. Ball Case*, supra, was decided. We may add that it would be an anomaly to hold that when the law makers gave the commission the general control of county property that they could not rent or lease it when a sale of same was not advisable and it was no longer needed or used for county purposes.

* * * * *

"We also quote from the opinion of the Nebraska Court, *Lindburg v. Bennett*, 117 Neb. 66, 219 N. W. 851:

"This is an equity suit in which the district court decreed that a 99-year lease of certain real property made by the county * * * was invalid. * * *

"The lease is conditioned upon the payment of an adequate annual rental with an agreement for valuable and permanent improvements to be made by the lessees who covenant to pay taxes and assessments of every kind. Upon failure of the lessees to perform its covenants the term ends. It contains no revaluation clause, but the evidence shows that this is not unusual in modern leases of this type. At the end of the term the improvements will belong to the lessor. There was no fraud in its procurement. It was a lease and not a sale and was made on behalf of the lessor within the authority of the law. When so made we cannot interfere with the powers of the board. To substitute our discretion for

theirs would usurp functions not committed by the Constitution to the judicial department of our state government.

“As a result, we deduce the following: A county board will not be enjoined from leasing, for a term of 99 years, real estate owned by the county but not actually used by it nor needed for its actual uses * * * .”

“See also Reynolds’ Heirs v. Stark County Com’rs. 5 Ohio 204, and Williamsburg v. Lyell, 132 Va. 455, 112 S. E. 666.

“Our statute permits leases to extend 99 years and it would be an invasion of the legislative branch to reduce the period to the term of the commission when a long term lease may be advantageous to the county.

“We are not impressed with the contention that the lease in question violates Section 94 of the Constitution of 1901. We fail to see how the operation of the lease will incur any pecuniary liability on the county or that it engages the county in a private business. It is a straight out ground lease for a fixed rental to be absorbed in part by valuable improvements which are to revert to the county upon the expiration of the lease. The fact that the rental is to be enhanced by a commission based upon the volume of business of the lessee does not make the county a party engaging in a business entailing upon it a profit and loss.” (Emphasis ours).

With reference to the legality of a donation by the Board of your county to said Junior College of an amount equal to the rent paid by said College, it is my opinion that such a plan would be doing indirectly that which cannot be done directly, that is, donating the fair and reasonable rent of said property to the college.

Assuming the transaction is not an evasion of the lack of authority to give the college free rent, it is further my view that the Board of your county is without legal authority to donate public funds to this proposed institution, which, although public in its nature, is not part of the public school system of the State of Alabama. Your Board derives its powers from the legislature, and in the absence of such legislative authority, it cannot expend public funds, no matter how worthy the cause. — Quarterly Report of The Attorney General, Vol. 3, p. 44.

I pretermit discussing the authority of your Board to donate any funds in aid of said college when and if it becomes a State institution. That question is not before me, and it is not necessary to commit this office thereon.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1938

Hon. E. C. Whelan, License Inspector,
Jefferson County,
Birmingham, Alabama.

Truck, upon which rated capacity is stamped $1\frac{1}{2}$ to 4 tons, should carry license for "trucks of 3 tons and less than 4 tons."

License for truck, upon which rated capacity is stamped 1-2 tons, should be determined by whether 1-2 means $\frac{1}{2}$ ton or 1 to 2 tons.

Truck, upon which rated capacity is stamped 1 to 2 tons should carry license for "trucks of 1 ton and less than 2 tons."

Truck, upon which rated capacity stamp has been obliterated, should carry license for actual rated capacity. Said capacity can be ascertained from manufacturer.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of July 5, 1938, which is as follows:

"The Commissioner of Licenses in Jefferson County issued a license for an International truck and the applicant stated that the rated capacity of the truck was $1\frac{1}{2}$ Tons, and on that statement an H2 license was issued for \$23.00. Sometime later, I, as License Inspector, inspected the license on this truck and found that the manufacturer's identification plate attached to the truck shows $1\frac{1}{2}$ to 4 Tons. Please give me your opinion as to whether this truck has the proper license on it, (H2 Tag) or should we cause him to purchase an H4 or H5 license?

"(2) I wish you would give me your opinion on the following: There are a number of motor trucks manufactured, and the manufacturer's rated capacity stamped on the vehicle as follows:

- 1 - 2 Tons
- 2 - 3 Tons

"Then in other cases it is stamped on the truck in the following manner:

- 1 to 2 Tons
- 2 to 3 Tons

"Schedule 158.5 says that the license is based on the manufacturer's rated capacity stamped on the truck, '(a) Trucks less than 1 Ton, \$15.00, (b) Trucks of 1 Ton and less than 2 Tons, \$22.50.' In other words, no manufacturer's rated capacity stamped on the truck states that the capacity is less than any given number of tons as called for in the license schedule, but as stated above, 1 to 2 Tons, or 1 - 2 Tons. What license should a truck take when stamped:

- 1 to 2 Tons H1 or H2 Tag?
- 1 - 2 Tons H1 or H2 Tag?

"In a good many cases the identification plate stamped on the truck by the manufacturer has been lost off or removed, and there is no identification mark by the manufacturer stamped on the

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 26, 1938

Hon. R. E. Adams,
Judge of Probate,
Escambia County,
Brewton, Alabama.

County Commissioners without authority to send tractor drivers to a school that trains them in tractor operation and mechanics.
Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry, to which this opinion is addressed, as follows:

"The State Examiners recently completed an examination of the records of the Court of County Commissioners and the County Depository for the fiscal period from October 1, 1936 to September 30, 1937, and they charged one of the County Commissioners with the sum of \$22.50 for expenses paid for county road employees while attending a free tractor school in Montgomery, referring me to the opinion of your office which is found in Volume 8, at page 163.

"Please refer to this opinion. No doubt, there is an absence of any specific provision in the laws of Alabama for the payment of such expense, but I feel that a more liberal construction of the law should be given in a matter of this nature.

"The claim of this Commissioner was regularly filed, audited and allowed before payment from the Gasoline Tax Funds, and as I understand the law, the Gasoline Tax Funds are to be used exclusively for the supervision, maintenance, construction and repair of county roads and bridges. The Commissioner sent these regular county road employees to this free tractor school to receive instructions as to the operation and maintenance of their tractors and road machine in order that they might be able to operate and care for them more efficiently and to learn up to date methods in road repairing and maintenance. The benefits derived from the courses of instructions given by these schools would naturally inure to the benefit of the county and therefore, I am unable to understand why such an expenditure should be classed as an illegal one.

"The Court of County Commissioners is authorized to send its Attorney, Clerks, Road Engineers and others it may designate, to the conventions of the Association of County Commissioners for the purpose of receiving instructional and educational information with regard to county governmental and road matters and the expenses of those so sent are classed as valid claims against the Road & Bridge Fund.

"It appears to me that the expenses of the road employees who are sent to attend tractor schools and the expenses of county officers and employees who are sent to attend the conventions of the Association of County Commissioners, all being for the benefit and common good of the county and the taxpayers, they would certainly come to be classed in the same category and should be treated accordingly.

"Your early expression and official opinion on this matter will be appreciated."

The opinion of this office, dated August 18, 1937, addressed to Hon. Charles W. Lee, State Comptroller, Capitol, reported in the Quarterly Report of the Attorney General, Volume 8, page 163, answers your request in the negative, and to that conclusion I still adhere.

However, in elaboration thereof, prompted by your inquiry, it is my view that an employee of the county who performs day labor in the operation of a grading machine and tractor, or who services a tractor used in the grading and maintenance of roads in a county, is quite a different person, in the perspective of the law so far as duties and authority are concerned, from a county commissioner who was elected by the people to exercise general superintendence over the roads of the county, and is quite different from a person, so far as duties are concerned, who is employed as an engineer, or in some other capacity, to assist the county commissioners in the performance of superintendence over roads pursuant to Section 1397 (110), Michie's Alabama Code, 1928, from which I quote as follows:

"The courts of county commissioners, boards of revenues, or other like governing bodies of the several counties of this State have **general superintendence** of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable." (Emphasis ours).

This office has held in an opinion, dated May 10, 1935, to Hon. J. W. Heustess, Clerk, Board of Revenue, Montgomery, Alabama, that the Court of County Commissioners is vested with authority, under Section 1397 (110), supra, to pay the needful and necessary expenses of its members incidental to attending the meeting of the Association of County Commissioners of Alabama, to the end that they may attend educational lectures, exhibits, and demonstrations at said meetings, thus advancing the economics of road construction and maintenance. This opinion, and others similar in character, are predicated largely upon the idea that such attendance will better enable the commissioners to exercise and perform the powers of general superintendence over road construction and maintenance, and to that objective, the statute, broad in its provisions, authorizes all of the needful and necessary expenses. Such reasoning has application to those persons employed by the county to assist the commissioners in the exercise of that general superintendence in the matter of road construction and maintenance.

The employees mentioned in your letter have no identity with that superintendence vested in the commissioners over road and bridge construction and maintenance, but on the other hand such employees are engaged only to perform the work designated by the commissioners and their assistants pursuant to their powers of general superintendence vested by law. The salary of these employees may be decreased or increased, at the will of the commissioners, in harmony with their ability, and compensatory with the expenses they have incurred and paid out of their own pocket while attending a free school that offers training in tractor operation and mechanics.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 26, 1938

Dr. J. N. Baker,
State Health Officer,
Capitol.

1. Dogs may be inoculated at any time by the Rabies Inspector, by a competent veterinarian, or other person duly qualified by the County Board of Health.

2. Where a dog has not been inoculated prior to the date fixed by the Rabies Inspector and the State Health Officer, the owner of the dog is liable for a fee of fifty cents, in addition to the cost of inoculation, in cases where the dog is found running at large and is apprehended by a person charged with the enforcement of the act.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of August 16, 1938, which is as follows:

"The Dog Control Act (Act No. 200, General and Local Acts, Extra Session 1936-1937, page 230) provides in Section 3 that 'On or before a day fixed annually by the Rabies Inspector of each county, with the approval of the State Health Officer, every owner of a dog, not confined at all times to an enclosed area, or on leash, or muzzled, shall cause such dog to be inoculated against rabies by the Rabies Inspector, by a competent veterinarian, or other person duly qualified by the respective county boards of health. . . .'

"It is further provided in Section 7 that 'On or after the date annually fixed by the Rabies Inspector, any dog found running at large, and not wearing the evidence of inoculation as provided therein, and for which no certificate of inoculation can be produced . . . shall forthwith be subject to a penalty of 50c, to be imposed by the Rabies Inspector on the owner of said dog'

"In the light of these requirements, I beg to ask your opinion on the following points:

"1. After the penalty period has become operative, may any one other than the duly appointed Rabies Inspector inoculate dogs?

"2. Can a competent veterinarian, referred to above, inoculate for 50c after the penalty period has become operative, thus abetting the violation of the Act?

"3. If a competent veterinarian can inoculate dogs after the penalty period has become operative, is it incumbent on such veterinarian to collect the penalty?"

I am of the opinion that your first and second inquiries should be answered in the affirmative. Section 3 of the so-called said Dog Control Act is the only provision of law which authorizes any particular person or persons to inoculate dogs. It is my judgment that persons specified therein may inoculate dogs at any time during the year, whether it be before the date annually fixed by the Rabies Inspector and State Health Officer, or sub-

sequent thereto. The date fixed as a deadline is merely for the purpose of the enforcement of the Act and was not intended to restrict the persons named therein in their operation.

In answer to your third inquiry, I am of the opinion that it is not incumbent upon a veterinarian to collect the penalty fee in cases where the owner of the dog takes it to the veterinarian for inoculation, even though the penalty date has expired. In my judgment, the penalty provided in Section 7 of the Act attaches only when a dog is found running at large and is apprehended by an officer or other person charged with the enforcement of the Act. The penalty fee is to be turned over to the person making the apprehension. It is my opinion that the owner of a dog which has been apprehended must pay the fifty cent penalty fee in addition to the inoculation fee provided by Section 6 of the Act, but that said owner may have the dog inoculated by the Rabies Inspector or any other person qualified under the provisions of Section 3 of the Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 26, 1938

Hon. T. C. Garner,
Treasurer of Jefferson County,
Birmingham, Alabama.

Jefferson County — Commissioners Court authorized to pay expenses of commissioner or employee in connection with trip on official business of county made under order or direction of the Commission (Section 13 of Act No. 198, H. 596, approved November 3, 1932, (Local Acts, 1932, p. 84). Not authorized to defray expenses of commissioner or employee for any trip unless on official business and properly authorized.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of recent date, which is as follows:

"I wish to refer you to a resolution passed by the County Commission of this County January 11, 1938, wherein they authorized M. E. Boriss, Acting Sanitary Engineer and one County Commissioner to make a trip to New York City to attend the Annual Meeting of the American Society of Civil Engineers and the New York State Sewage Workers Association. The resolution further authorized that the expenses of this trip be borne by the County:

"I should like to be advise by your office on the following two questions:

"(1) Has the Commissioners Court of Jefferson County the authority to pay either the expenses of a County employee or of a Commissioner in connection with a trip as shown in the above referred to resolution?

"(2) Has the County Commission of Jefferson County the authority to defray the expenses of a member of the Commission or of any County employee or official at any time in connection with any trip made by such Commissioner, employee or official out of the boundaries of Jefferson County, regardless of the nature of the business intended?

"If the answer to either of the above questions is in the affirmative, would you please be so kind as to cite me the law or laws that give the Jefferson County Commission the authority that determined such an answer or answers?"

I am of the opinion that your first inquiry should be answered in the affirmative, assuming the trips in question were on official business of the county and were made under the order or direction of the County Commission. If so, said expenses may be paid by the county under and by virtue of Section 13 of Act No. 198, H. 596, approved November 3, 1932 (Local Acts 1932, p. 84), which is as follows:

"Section 13. That said commission may at its discretion pay out of county funds the traveling or other expenses of any county officer or employee, when such officer or employee creates such expense under order or direction of such commission."

I am of the opinion that your second inquiry should be answered in the negative. Although Section 13, *supra*, allows the County Commission in its discretion to pay out of county funds traveling expenses of a county officer or employees, yet such discretion, in my opinion, is limited to official business of the county, and unless traveling expenses are created on official business same cannot be paid out of county funds.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 30, 1938

Hon. Ed Pettus,
Secretary-Treasurer,
State Licensing Board for General Contractors,
Montgomery, Alabama.

1. A general contractor who bids on projects of Electric Membership Corporations, organized under the provisions of Act No. 45, General Acts 1935, page 100, approved February 7, 1935, as amended by Act No. 168, General Acts 1935, page 129, approved July 8, 1935, within the State of Alabama should comply with the law governing general contractors and be licensed by the State Licensing Board for General Contractors before bidding on such projects in the State of Alabama.

2. A general contractor who bids on projects of such Electric Membership Corporations within the State of Alabama before he has been licensed by the aforesaid Board may be prosecuted criminally for violating the provisions of the act governing general contractors.

a. In such a case, the Board has no recourse against the awarding authority.

3. Said board has authority to examine a general contractor and license him after he has bid on projects of such Electrical Membership Corporations within the State of Alabama before having obtained a license.

4. Such Electric Membership Corporations, when awarding contracts in an amount sufficient to come within the terms of the law governing general contractors are subject to the provisions of said law.

5. The same holdings will apply to an awarding authority other than an Electric Membership Corporation, unless there is a question of State or Federal sovereignty involved, or the awarding authority comes within the exempted class set out in Section 13 of said Act.

Opinion by Assistant Attorney General Garrett:

Dear Sir:

I have your letter of August 2, 1938, which is as follows:

1. Does a person, firm or corporation who is a general contractor who bids on projects of electric membership corporations organized under the provisions of Act No. 45 General Acts 1935, page 100, approved February 7, 1935, as amended by Act No. 168, General Acts 1935, page 129, approved July 8, 1935, within the State of Alabama have to comply with the law governing general contractors (a copy of said law is enclosed herewith) and be licensed by said Board before bidding on projects of such corporations within the State of Alabama?

2. If a person, firm or corporation, as a general contractor, bids on such projects within the State of Alabama and has not been licensed by the aforesaid Board, what are the duties of the Board relative to the awarding authority and the contractor?

3. Has the contractors' Board authority to examine such a contractor and license him after he has bid on such projects?

4. Does the electric membership corporation awarding authority come within Section 15 of the law or any part of said law, or in other words is such electric membership corporation subject to the State Licensing Law for General Contractors?

5. Would your answer to any of the above questions be any different if the awarding authority was someone other than an electric membership corporation? If so, please advise in what particulars your answers would be different in such a case.

In the beginning it might be well to here point out that this office has previously held that electric membership corporations organized under the provisions of Act No. 45, General Acts 1935, page 100, approved February 7, 1935, as amended by Act No. 168, General Acts 1935, page 129, approved July 8, 1935, are neither agencies of the Federal Government nor of the State of Alabama, but rather that they are private corporations. Opinion to Hon. Gordon Persons, Chairman, R. E. A., Montgomery, Alabama, under date of February 17, 1937, Quarterly Report of the Attorney General, Volume 6, page 76; opinion to Hon. Gordon Persons, Chairman, R. E. A., Montgomery, Ala-

bama, under date of June 4, 1938, Quarterly Report of the Attorney General, Vol. 11, page 116. Therefore, no question of Federal or State sovereignty could be involved in the matter here under consideration.

The answers to your several inquiries are found in the provisions of the act governing general contractors. This is Act No. 297, General Acts 1935, page 721, approved September 2, 1935, and effective sixty days after its approval.

Section 1 of said Act, defines a General Contractor as follows:

For the purpose of this Act a "general contractor" is defined to be one who, for a fixed price commission, fee or wage, undertakes to construct or superintend the construction of any building, highway, sewer, grading, or any improvement or structure where the cost of the undertaking is ten thousand dollars or more, and any one who shall engage in the construction or superintending the construction of any structure or any undertaking or improvements above mentioned in the State of Alabama, costing ten thousand dollars or more, shall be deemed and held to have engaged in the business of general contracting in the State of Alabama.

Section 9 of said act reads in pertinent part:

"Anyone hereafter desiring to be licensed a general contractor in this state, shall make and file with the Board * * * a written application * * * ." (The Board here referred to in said section is the State Licensing Board for General Contractors which is provided for in said Act).

The remainder of said Section and Sections 9½ and 10 of said Act provide for the method or manner by which the Board shall receive applications, conduct examinations and issue and revoke licenses.

Section 11 reads:

"The issuance of a certificate of license by this Board shall be evidence that the person, firm or corporation, named therein is entitled to all the rights and privileges of a licensed general contractor while the said license remains unrevoked or unexpired."

Section 12 provides in pertinent part:

"Any person, firm or corporation not being duly authorized, who is engaged in the business of general contracting in this state, except as provided for in this act, * * * shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than Five Hundred Dollars (\$500.00) or imprisonment of six months, or both fine and imprisonment, in the discretion of the court."

Section 14 reads in part:

"All architects and engineers preparing plans and specifications for work to be constructed in the State of Alabama, shall include in their invitations to bidders and in their specifications a copy of this act or such portions thereof as are deemed necessary to convey to the invited bidder, whether he be a resident or non-resident of this

state and whether a license has been issued to him or not, the information, that it will be necessary for him to show evidence of license before his bid is considered. * * * "

Section 15 provides:

"No awarding authority or its agent shall issue to other than a licensed general contractor, or his authorized representative, plans or specifications or proposed forms, where these are required; and where bids are to be received on the forms furnished by the awarding authority, no proposal forms or plans or specifications shall be issued to anyone except a licensed general contractor or his representative."

It is to be noted that Section 1, supra, defines a general contractor as one who "undertakes" to construct or superintend the construction of any building, etc., as well as one who shall engage in the construction or superintending the construction of any structure, etc. in Alabama. Reading this definition in connection with the other provisions of the act hereinabove quoted, and especially with those provisions of sections 14 and 15 in regard to bids, it is my opinion that a general contractor who bids on projects of such an electric membership corporation within the State of Alabama should comply with the law governing general contractors and should be licensed by said Board before bidding on such projects within the State of Alabama. As I construe the various provisions of the act, bidding on projects is a necessary incident to, and a part of, the business of general contracting.

If a general contractor who has not been licensed by the Board bids on projects of such an electric membership corporation, within the State of Alabama, he may be prosecuted criminally in the courts of the state in accordance with the above quoted provisions of Section 12 of said Act, and the Board could make complaint against him in the courts.

While the awarding authority, in this case, such an electric membership corporation, is charged by the provisions of Section 15, Supra, with issuing plans or specifications or proposed forms to only licensed general contractors, there is no penalty placed upon an awarding authority for failure to comply with the provisions thereof. Consequently, it is my opinion that the Board would have no recourse whatever against such an electric membership corporation if it issued plans or specifications or proposed forms to, and accepted bids from a general contractor who had not been licensed by the Board.

There is no provision contained in said Act prohibiting the Board from examining and licensing a person as a general contractor because of the fact that he may have bid on a project before he received a license from the Board. Therefore, it is my opinion that the Board has authority to examine a contractor and license him, even after he has bid on projects of such an electric membership corporation in the State of Alabama, without having first secured a license, just as it would have the authority to do if he had not so bid on such projects. If the Board is satisfied after examination of this contractor's application for license that he is entitled to a license, it is my opinion that such a license should be issued to him.

Such an electric membership corporation, if it lets a contract in an amount sufficient to come within the terms of the act regulating general contracts (\$10,000. Section 1), comes within the purview of Section 15, supra,

and should comply with the provisions of said section, and with any other applicable provisions of the act, just as any other awarding authority.

However, as hereinabove stated, there is no recourse against an awarding authority if it fails to comply with the provisions of said act.

Section 13 of the act, which deals with exemptions, has been carefully noted, but neither a general contractor bidding on projects of such electric membership corporations, nor such electric membership corporations themselves, fall within the exempted class.

My answers to the above questions would not be any different if the awarding authority was someone other than an electric membership corporation, unless, of course, there was a question of state or Federal sovereignty involved, or the awarding authority came within the exempted class set out in Section 13 of said Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 31, 1938

Hon. G. H. Boyd, Register,
Circuit Court,
Tenth Judicial Circuit of Alabama,
Birmingham, Alabama.

Fees: After the passage of Act No. 577, S. 291, approved July 28, 1931 (General Acts 1931, p. 669). The Register of the Circuit Court of the Tenth Judicial Circuit of Alabama should deduct five percent of all moneys collected for the state and turn the money deducted, over to the Treasurer of Jefferson County, Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date in which you state:

"Senate Bill No. 291, as shown on page 669 of the General Acts of Alabama, Approved July 28, 1931 provides as follows:

'That the Clerks and Registers of the several Circuit Courts of the State of Alabama shall receive five percent of any sum or sums collected by such Clerk or Register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such Clerk or Register making the collection from such sum or sums collected.'

"I would appreciate an official opinion on the above Act pertaining to monies collected by the Register of this county for the State of Alabama subsequent to the approval of the Act."
You request my opinion as follows:

"Should I deduct 5% from all moneys collected for the State of Alabama, subsequent to July 28, 1931."

In my opinion your question should be answered in the affirmative. Act No. 468, H. 913, approved September 14, 1915, (Local Acts, 1915, p. 374) provides in part as follows:

"Section 1. That the method and basis of compensation of the following officers of Jefferson County, to-wit; the sheriff, the judge of probate, the tax collector, the tax assessor, the clerk of the circuit court, the clerk of the criminal court, and register in chancery of said county be changed, and that said officers be paid an annual salary, which shall be paid to and received by the said officers in lieu of all other compensation, fees or emoluments as follows: * * *

" * * * the clerk of the criminal court, and the register in chancery shall each receive an annual salary of thirty-six hundred dollars, which said annual salary shall be paid out of the county treasury in equal monthly installments at the end of each month.

"Section 2. That when this act goes into effect, the cost, charges of courts, fees and commissions now authorized by law to be collected and retained by the several officers of Jefferson county above named, shall continue to be collected, but shall be paid into the county treasury by the officer collecting the same, as other monies belonging to the county are paid."

In my opinion, the Legislature in passing Act No. 577, S. 291, approved July 28, 1931 (Gen. Acts 1931, p. 669) increased the income of Jefferson County, Alabama, and not the Register personally, as the Register should deduct the five percent and turn the same over to the County.

The Legislature by passing this act did not place any additional duties on the Registers but merely allowed them compensation for services which they had always been obligated to perform: collecting court costs has always been a part of the Register's regular duties, but before the passage of the 1931 Act, they did not receive any compensation for said services.

In the case of **Armstrong vs. Jefferson County**, 208 Ala. 645, 95 So. 39, the Supreme Court held that,

Under Gen. Acts 1919, pp. 12, 13, Sections 12, 13, conferring on the circuit in equity jurisdiction to condemn property used for violating the prohibition laws and specifying the application of the proceeds after paying the costs and expenses of the suit, the register in chancery is given no additional or different fees for his services in such suits than he received in other suits, and such fees belong to the county under Local Acts 1915, p. 374, Sections 1, 2, fixing the salary of the register in chancery in Jefferson County, and requiring him to pay all fees into the county treasury.

In this case, Justice Miller speaking for the Court said:

"No costs, charges of courts, fees, or commissions are permitted by this act to be collected by and for the register in these condemnation causes, which were not permitted and allowed to be collected by the register in other causes in the court when the Salary Act of 1915 (Local Acts 1915, p. 374), was adopted; and his salary of \$3,600 per annum was intended to be 'in lieu of all other compensation, fees or emoluments.'

"If the act of 1919 required more work to be performed by the register by conferring this additional jurisdiction of condemnation proceedings on the circuit court in equity, then relief therefor, if necessary, could and should come from the county by the board of revenue providing additional clerical or other assistance for the reg-

ister under section 3 of the act of 1915, because the additional jurisdiction conferred on the court by adding to it these condemnation causes increased the income of the county, as well as increased the work and duties of the register. The fees and costs in these condemnation causes and proceedings are the same as the fees and costs in other causes in that court; they are not new fees and new costs for different services rendered, but they are the same fees and same costs for the same services rendered in other causes in the court. These fees and costs sued for were for fees and costs due the register in causes in the circuit court in equity; they arose from causes in that court, and only such fees and costs were collected in them by the register as were authorized to be collected and would likely arise in any suit in equity, and under Local Act of 1915, p. 374, these fees and costs sued for were properly collected by the register, and properly paid by him to the treasurer of the county, and they belong to the county of Jefferson, the defendant.

"When the duties and labors of the register are increased by additional jurisdiction of causes of action given to the court, this would not, of itself, increase his salary by the fees in these causes. The suits filed in the court would likely, on account, thereof, be increased in number, and the costs, charges of court, fees, and commissions due the register would be correspondingly increased. The income to the county would be affected, and not the register, by it, as the costs, charges of court, fees, and commissions from the causes or suits would belong to the county, and not to the register. The gain would affect only the county. The income to the county would be increased by it, and the duties and labors of the register would be increased by it, and this could be correspondingly regulated by the board of revenue increasing the clerical or other assistance given the register to perform the additional duties and labors of the office, if necessary, as the circumstances required. This was the purpose of the amendment to the Constitution of 1901, known as the Jefferson County Salary Amendment; it was the design of the statute, and such was the intent of the Legislature, as we read and consider this act of 1915. The Legislature never intended to place the compensation of the register on a part salary and a part fee system basis. It intended to abolish the fee system entirely as to the register.

"It is true that this court in *Waldrop v. Henry*, 207 Ala. 128, 92 South. 425, which was approved by a divided court of four to three in *Jefferson County v. Waldrop*, 207 Ala. 606, 93 South. 540, held that the clerk of the circuit court personally, and not Jefferson county, owned and was entitled to the fee of 25 cents for the services rendered, and each dog tax license issued by the clerk under the Dog Law Act approved September 30, 1919. Gen. Acts 1919, p. 1077, Section 9. This was not a fee authorized by law when the local salary act of 1915 was adopted and approved. It is not a fee provided for in any case, or that is likely to arise in any case in the circuit court; it is not a fee growing out of any case in the circuit court; and it has no natural connection with the duties or fees or costs of the circuit clerk. These cases have no conclusive application or bearing on the ownership of the fees involved in this suit. The fees in this case are different from the dog tax fee. These fees and costs arose in causes in the equity court, and they were collected under the general schedule of fees and costs allowed the register in the Code in causes in the circuit court in equity. * * *

The premises considered, it is therefore my opinion that after the passage of the 1931 Act, the Register of the Circuit Court of the Tenth Judicial Circuit of Alabama, should deduct five percent of all moneys collected for the state and turn the money deducted over to the Treasurer of Jefferson County, Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 31, 1938

Mrs. C. F. Hart,
Tax Assessor,
Covington County,
Andalusia, Alabama.

Taxation — Municipally owned real estate —

Under Section 91 of the Constitution, real property acquired by a municipal corporation by means of redemption of the same from State (which was purchaser at tax sale) in order to protect municipal claim for taxes thereon, is exempt from state and county taxes during the period that it is so held by the municipality.

Opinion by Assistant Attorney General Rowe.

Dear Mrs. Hart:

I have your request for opinion as follows:

"The property of Mrs. Anna Riley sold to the State for 1936 tax and the City of Andalusia, to protect its city tax, redeemed this property from the State and the Probate Judge turned this redemption over to me. To whom should I assess this property, as city property is not taxable."

In my opinion the property ought not to be assessed for taxation as long as it is held by the City of Andalusia.

Under Section 91 of the Constitution, the real and personal property belonging to municipal corporations are exempt from taxation. This constitutional exemption has been liberally construed by the Supreme Court. In a recent pronouncement, In Re Opinions of the Justices, 179 So. 535, the Court held that property acquired by Municipal Housing Authorities in connection with slum clearance projects, is exempt under said constitutional provision. By analogy, it would seem, if the municipal corporation acquires the property for any municipal purpose, or pursuant to any statutory authority for such acquisition, the exemption applies. Cf. Quarterly Report of Attorney General, Vol. III, page 134, and Vol. X, pages 105-106.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 1, 1938

Hon. G. H. Howard,
Probate Judge of Elmore County,
Wetumpka, Alabama.
Public Funds —

Commissioners Court of Elmore County may legally appropriate money for the erection of public buildings in the county to be used for Home Demonstration Agents, but not for Parent Teachers Association meetings, provided there is no room in the courthouse or other public buildings for said agents and the court has decided that such appropriations would save the county money as the county would have to rent buildings to house said agents.

County Board of Education of Elmore County has no authority to appropriate funds for the erection of buildings to be used by the Home Demonstration Agents and the Parent Teachers Associations.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date in which you request my opinion as follows:

"Please advise whether or not the Commissioners Court can legally appropriate money for erection of buildings in the county to be used for Home Demonstration Agent purposes and for Parent Teachers Association meetings.

"Advise us also whether or not the Board of Education can legally appropriate money for the same purposes.

"Also advise us in case of making such appropriation whether by Commissioners Court or Board of Education, if a deed must be made to the County; and if the Board of Education should jointly with the Commissioners Court make such appropriation, should the deed be made to both the County and Board of Education, or in such case how should deed be made if required."

It is my opinion that the Commissioners Court may legally appropriate money for the erection of public buildings in the county to be used for Home Demonstration Agents, provided there is no room in the courthouse or other public buildings for said agents, and the court has decided that such appropriations would save the county money as the county would have to rent buildings to house said agents.

Section 212 of the 1923 Code of Alabama provides in part as follows:

"ERECTION OF COUNTY BUILDINGS. — The courts of county commissioners and boards of revenue of the respective counties shall erect courthouses, jails and hospitals, and other necessary county buildings * * *"

In my opinion, such buildings subject to the qualification as enumerated, *supra*, would come within the term "and other necessary county buildings" as used in Section 212, *supra*.

This office in an opinion to Hon. J. S. VanValkenburg, Chairman, Board of Commissioners, under date of May 14, 1937, **Quarterly Reports of Attorney**

General, Vol. VII, p. 137, held that the Court of County Commissioners of Madison County was authorized to purchase land upon which to erect public buildings to house the County Health Officer and the County Farm and Home Demonstration Agents.

I am unable to find authority for the Court of County Commissioners to contribute funds for the erection of buildings for Parent Teachers Association meetings.

The title to the land upon which said buildings are to be erected should be in the county before any appropriations are made by the Commissioners Court.

In my opinion, the County Board of Education has no authority to appropriate funds for the erection of buildings to be used by the Home Demonstration Agents and the Parent Teachers Association as such use would not be for school purposes as contemplated by Section 132 of the 1927 School Code, which provides in part as follows:

"POWERS OF COUNTY BOARD. — The County Board of Education shall have the right to acquire, purchase, or by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. * * *"

Public funds can never be expended unless there is expressed or necessarily implied authority for the expenditure. **Quarterly Reports of Attorney General**, Vol. IX, p. 145; **Quarterly Reports of Attorney General**, Vol 1, p. 304; **Biennial Report of Attorney General**, 1928-1930, pp. 826-981.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 1, 1938

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

Department of Health — Reports of blood tests made for physicians by the Department of Health are not public records and copies of these reports need not be preserved.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter wherein you request my opinion as follows:

"In the operation of our laboratory system, duplicate copies of reports covering specimens examined for physicians of the State are kept. Over a number of years these accumulate to such extent as to take up much filing space.

"Is there any requirement in the law making necessary the holding of these duplicates for any specified length of time before being destroyed?"

From a conversation with your office I understand that the reports to which you refer are reports on blood tests for venereal diseases. Accepting this premise your question must be answered in the negative. It is my opinion that these copies of reports to physicians are not public records. Public records have been defined as follows:

"Strictly speaking, a public record is one made by a public officer in pursuance of duty, the immediate purpose of which is to disseminate information or serve as a memorial of official transactions for public reference.

People vs. Harnett, 226 N. Y. S. 338. See also an opinion of this office addressed to Hon. Henry S. Long, dated July 11, 1935.

I can find no statute imposing upon the State Health Department the duty to make blood tests for physicians in the State and further you have advised me that there is no rule or regulation of your department requiring that these tests be made. Further I quote from the case of **People vs. Harnett**, *supra*:

"Reports of private individuals, government officials, even pursuant to statute, correspondence of such officials in matters relating to private affairs of a citizen, although in connection with public business or memoranda of public officers for their own convenience, are not public documents or records unless made so by statute."

Since there is no statute or rule or regulation properly promulgated specifically making these reports or copies of reports of laboratory tests public records, I am of the opinion that there is no duty upon the State Health Officer to keep these records for a specified length of time. Further, you will note that Section 2690, Code of 1923 requires public officers to keep records of * * * activities or business **required to be done or carried on** by such officer * * * ." (Italics ours).

Therefore, there is no duty upon the State Health Officer to keep these copies of reports for any specified length of time and you may destroy them at any time, although pursuant to Section 1111, Code of 1923, it is my opinion that an abstract for statistical information should be made from these records.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 1, 1938

Hon. James A. Crane,
Register in Chancery,
Mobile, Alabama.

Trial Tax — Municipal assessment cases — Section 9, General Revenue Act of 1935, General Acts of 1935, p. 263.

Municipalities exempt from payment of trial tax on cases filed in the Circuit Court in Equity to collect street paving, white way, and sidewalk improvement assessments.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry as follows:

"Will you please look at page 8, Section 9 of the Revenue Bill of 1935 and give me your opinion as to whether I shall charge a trial tax fee in cases filed by the city against property owners, for the collection of street paving assessment, white way assessment, sidewalk improvement assessment.

"A large number of these cases were filed with me today and people are asking for bills, and for this reason I am asking you to let me hear from you as soon as you can."

It is my opinion that the City of Mobile is exempt from the payment of trial tax on the suits which it filed, as stated in your letter, to collect street paving, white way, and sidewalk improvement assessments.

Although the original act (Acts of 1919, p. 282, Section 4½) did not so provide, Section 9, General Acts of 1935, page 263, imposing a trial tax of \$3.00 on all cases pending or filed in the Circuit Court of Alabama, contains a provision as follows:

" * * * This trial tax fee shall not, however, be imposed or collected in cases made by any city or town, as a result of the filing by the clerk or other officer of such city or town with the Register of the Circuit Court or like officer of a court of the county having equity jurisdiction, of a list of delinquent taxpayers and property upon which city or town taxes are due as is now or may hereafter be required by law; nor shall said trial tax fee be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings in which said trial tax fee has been imposed, and cases for municipal assessments shall not be subject to such tax, and tax cases." (Emphasis ours).

The aforementioned portion of Section 9, supra, imposing a trial tax, in the beginning exempts cases filed to collect municipal and ad valorem taxes, and at the conclusion exemption is granted to cases of municipal assessments, and tax cases.

Exemption already having been granted to cases for the collection of municipal ad valorem taxes which are certified to the Register for foreclosure as authorized by Section 2134-35, Code of Alabama, 1923, it is evident that the Legislature intended to exempt cases involving all types of assessments and taxes, including those mentioned in your inquiry; otherwise, there would have been no necessity, if only cases to collect ad valorem taxes were exempted, to broaden the exemption so as to include all cases for municipal assessments, as well as all other tax cases. Therefore, cases filed to collect the assessments are not subject to trial tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 2, 1938

Hon. S. L. Johnson, Clerk & Register,
Circuit Court of Calhoun County,
Anniston, Alabama.

Witnesses — Grand Jury Witnesses — Fees

1. Where a Grand Jury does not find an indictment, the witnesses appearing before the same are to be paid from the fine and forfeiture fund of the county.

2. Where an indictment is found by the Grand Jury and the defendant is remanded to the Juvenile Court or the court declares the defendant insane, the fees of the witnesses appearing before the Grand Jury are to be paid from the fine and forfeiture fund of the county.

3. Where an indictment found by the Grand Jury is ordered withdrawn and filed, fees of the witnesses appearing before the Grand Jury are to be paid from the fine and forfeiture fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Will you kindly answer the following questions as to witness fees:

"In an investigation by the Grand Jury witnesses are summoned and given attendance certificates and the Grand Jury does not bring in a true bill nor declare no bill but makes certain recommendations, how are these witnesses to be paid?

"Second, in a case where the witnesses are summoned by the Grand Jury and issued certificates of attendance and a true bill is found and later the defendant is remanded to the Juvenile Court, or the Court declares the defendant insane and the defendant is sent to the insane asylum, how are the witnesses paid?

"Third, if in a case where the witnesses are summoned by the Grand Jury and issued certificates of attendance and a true bill is found and later the Court declares the defendant insane and orders the indictment withdrawn and filed until further orders of the court, how shall the witnesses be paid?"

The answer to your inquiries is governed by the provisions of Section 3763, Code of Alabama, 1923. This Section provides as follows:

"Section 3763. HOW TAXED AND PAID. — The fees of witness, subpoenaed on the part of the state to appear before the grand jury, or before any court in which a criminal prosecution is pending, must be taxed against the defendant, if he is convicted, or against the prosecutor when the costs are imposed on him; but if the defendant is not convicted, and the costs are not imposed on the prosecutor, or if the indictment is withdrawn and filed, or the prosecution abated by the death of the defendant, or if the costs are imposed on

either the defendant or the prosecutor, and an execution against him for the same is returned 'no property found,' or if no indictment is found by the grand jury before whom the witnesses appear, or if a nolle prosequi is entered in the case, such fees must be paid by the county in the manner specified in Section 3769."

In reference to your first inquiry, you will note that the above quoted section provides that if no indictment is found by the Grand Jury before whom the witnesses appeared, the fees of these witnesses must be paid by the county in the manner specified in Section 3769 of the Code, 1923. This Section makes the fees of such witnesses payable from the fine and forfeiture fund of the county. (See opinion of Attorney General, Vol. X, p. 65).

In reference to your second inquiry, you will note that Section 3763 provides that if the defendant is not convicted, then the fees of the witnesses are paid as is specified in Section 3769, namely from the fine and forfeiture fund of the county. As is stated by you, where an indictment is found and the defendant is remanded to the Juvenile Court or declared insane, it is my opinion he has not been convicted of the charge placed against him by the indictment found by the Grand Jury. (See opinion of Attorney General to Sheriff, Chilton County on July 12, 1935). I am therefore of the opinion that the witnesses appearing before the Grand Jury in such a case would be paid from the fine and forfeiture fund of the county.

In reference to your third inquiry, you will note that Section 3763, supra, provides that if the indictment is withdrawn and filed, the fees of the witnesses appearing before the Grand Jury must be paid by the county as set forth in Section 3769. I am of the opinion that the facts stated by you in your third inquiry, come under this provision contained in Section 3763 and therefore the fees of the witnesses would be payable from the fine and forfeiture fund of the county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 2, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

County Financial Control Act, (Acts, 1935, p. 803) — Emergency obligations —

The re-equipping of the county courthouse is not such an emergency as is contemplated by Section 17 of the County Financial Control Act which authorizes the issuance of interest bearing warrants to meet emergency obligations.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"A certain county wishes to equip the entire courthouse with new equipment.

"Please advise if said county can issue interest bearing warrants under Section 17 of the County Financial Control Act, approved September 9, 1935, for said equipment?"

In my opinion, Section 17 of the County Financial Control Act (Acts, 1935, p. 803) affords no authority for the issuance of interest bearing warrants to re-equip the county courthouse.

Said Section 17 provides:

"Section 17. **EMERGENCIES.** In the event any situation over which the Board of Revenue, County Commissioners or other like governing body has no control results in an appreciable obligation against the county over and above what said Board has reason to anticipate, and for which no moneys from the current year's income are available to pay, such board may issue its interest bearing warrants, as now authorized by law, in an amount sufficient to pay such emergency obligation. And the interest and maturities or principal of such loans shall constitute a part of the budget for the year in which they mature. But before such warrants shall be authorized or sold under this Section, such Board shall inquire into and find that such emergency obligation has accrued, and such finding spread upon the minutes of its proceedings."

However, in my opinion, re-equipping the courthouse is not such an "emergency" as is there dealt with.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 2, 1938

Hon. Hamp Draper,
Associate Member,
State Board of Administration,
Montgomery, Alabama.

1. Section 3670, Code of 1923 — Delivery to penitentiary officials complete when convict delivered by sheriff to person presenting order of Board of Administration, as provided by Section 3610.

2. Such delivery complete under Section 3670, although convict paroled before he actually enters Kilby Prison.

3. Costs payable under Section 3667 are payable by Convict Department only when convict has been delivered to the penitentiary officials as above defined.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of July 21st in which you request my official opinion as follows:

"The Convict Department respectfully request your opinion on the following questions.

"Define delivery to the penitentiary officials under Sec. 3670 of the 1923 Criminal Code.

"Would surrender or delivery to the Convict Department constitute delivery to the penitentiary officials under Sec. 3670 although subject was paroled by the Governor before he was entered as a prisoner at Kilby Prison?

"Would the Convict Department be held liable for Criminal Court costs payable under Sec. 3667 of the 1923 Criminal Code if a person convicted of either a felony or misdemeanor was not received by the penitentiary officials which authorizes such payment under Sec. 3670 Criminal Code of 1923?"

Before answering the specific questions set out in your letter, I would like to call your attention to some of the law applicable.

Section 3667 of the Code of Alabama of 1923 appears in Article 3, Chapter 106, regulating the convict system. As originally enacted, this section provided for the payment of costs of conviction in felony cases (Acts of 1923, p. 734). Section 3670 regulated the manner in which such costs were paid and expressly provides:

"No costs shall be paid until the convict has been delivered to the penitentiary officials, and where a convict is sentenced in more than one case, the costs in the succeeding case shall be paid when he is delivered to such officials."

This act of 1923 made no further reference to and did not purport to regulate the delivery of convicts to the penitentiary officials. For a proper answer to that question we are remitted to a consideration of the general law regulating convicts and the Convict Department. By Section 3582 it is provided that the State Board of Administration shall have the general supervision and control of state and county convicts. Section 3585, regulating the duties of the President of the Board of Administration, provides that he shall superintend the management of the convicts and all subordinate officers, persons or guards. It is made his duty to see that the laws regulating convicts are enforced and it is further provided that he may transfer prisoners from one to another penitentiary as he deems expedient. Section 3608 expressly provides that each prison or penitentiary shall be under the control of such officers as the Board of Administration shall think necessary. This clearly makes the penitentiary officials the agents or employees of the Board of Administration. The entire chapter regulating the convict system continues the policy set out in the above specific statutes, that is, that the convict system is under the entire management and control of the Board of Administration as regulated by these statutes.

The delivery of a convict after conviction is regulated by Sections 3609 and 3610, which provide as follows:

"Section 3609. When any convict is sentenced to the penitentiary, the judge of the court in which the sentence is had shall order such convict to be confined in the nearest secure jail; and the clerk of the court shall at once notify the president of the board of the jail where such convict is confined, and forward to him a copy of the judgment entry and sentence in the case, and inform him if any special care be necessary to guard such convict; and thereupon the president of the board shall direct where such convict be taken for confinement and hard labor."

"Section 3610. The sheriff having in his custody any person sentenced to the penitentiary, shall deliver such convict to the person

who presents the written order of the president of the board and shall take from such person duplicate receipts upon blanks to be furnished by the board, containing a descriptive list of such convict, one of which he shall retain, and the other he shall forward to the board."

There are no other statutes of Alabama regulating the delivery of convicts, either state or county, to the penitentiary officials. As you know, by virtue of the Act of 1927, page 51, the laws applicable to state convicts were made applicable to county convicts. By Section 6 of this act it was provided that:

"The courts of County Commissioners, Boards of Revenues, or other like bodies of the several counties of the state, may hereafter and they are hereby authorized and empowered to deliver to the State Board of Administration all county convicts heretofore sentenced to hard labor for the county or who may hereafter be sentenced to hard labor for the county in like manner as now provided by law for delivery of state convicts to the State Board of Administration. The State Board of Administration shall receive said county convicts in the same manner as they now receive state convicts, and shall pay to the proper county authorities the items of costs provided in Section 3667 of the Code of Alabama as now provided by law."

1. Bearing in mind these above statutes, we proceed to a consideration of the specific questions raised by you. In my opinion, the phrase "delivery to the penitentiary officials" as used in Section 3670 is interchangeable with and identical in meaning with the words "delivered to the State Board of Administration" as used in Section 6 of the Act of 1927. These words are used interchangeably and, in my opinion, refer to the delivery as specifically defined and regulated by Section 3610, above quoted. It is, therefore, my opinion that delivery to the penitentiary officials as required by Section 3670 is made the instant that the sheriff having the convict in custody delivers such convict to the agent of the Board of Administration as regulated by Section 3610.

2. In my opinion, when this delivery is complete, the parole by the Governor before the convict actually enters Kilby Prison would not affect the right of the officers to costs or the duty of the State Board of Administration to pay such costs.

3. Section 3670 makes the payment of the costs under Section 3667 expressly conditioned upon the proper delivery of the convict to the proper officials. In my opinion, until proper delivery of the convict is made under Section 3610, there is no liability for the payment of such costs. Nothing herein contained shall be construed as authorizing or approving any act of the Board of Administration, or any of its agents, refusing to accept the proper delivery of a convict and in this manner attempt to prevent the payment of legal costs. I have cited to you the statutes requiring the President of the Board to direct where the convict shall be taken and requiring the delivery by the sheriff to the agent of the Board of Administration. These are duties placed upon the Board by law, and the failure of the Board to perform such duties would render them subject to court action requiring the proper performance thereof. I do not mean to insinuate that any member of the Board of Administration would wilfully fail to perform their duty in this regard, but I merely wish to make myself clear that while the payment of costs is expressly conditioned upon delivery to the proper officials, it is made the duty of the Board to supervise and arrange this delivery properly

and the failure of the Board or its members to perform their duty properly should not prevent the right of the various officials to their properly earned costs.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 3, 1938

Hon. H. D. Lynes,
Sheriff, Washington County,
Chatom, Alabama.

A watchman must be provided for the county jail to be named by the sheriff unless a written order is made by the State prison inspector to the contrary.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 10, 1938, in which you request my opinion as follows:

"I have hired a night watchman to watch the jail. I have employed this man under Section 4879, Code of Alabama, 1923, and opinion by Assistant Attorney General Haynes of March 4, 1936. The Board of County Commissioners has refused to pay this man for his services.

"Is this a legal claim?"

Answering the above request, permit me to call your attention to Section 4879, Code of Alabama, 1923, which is as follows:

"Section 4879. DEPUTY OR WATCHMAN MUST BE IN ATTENDANCE. — Prisoners shall not be confined in any jail or prison in this state when such jail or prison is not provided with a deputy watchman or attendant, whose duty it shall be to watch the jail or prison at night for the prevention of escapes, and fire, and to aid in case of sickness among the prisoners, and who shall have access to the jail or prison and to the prisoners. If the state prison inspector is satisfied, after inspection, that the construction and management of a jail is such as to render a night watchman unnecessary, he may by written order to the sheriff suspend the appointment of said watchman, this order to be subject to revocation at the discretion of the prison inspector. The sheriff, in case of a county jail, or the proper governing authority, in case of a municipal jail, shall appoint, direct and control said deputy, watchman or guard, and the court of county commissioners or board of revenue, or the proper municipal governing authority, as the case may be, shall fix a reasonable salary and the same shall be paid out of the funds of the county or of the municipality, if it be a town or city jail, in which the jail is located."

This office has held time and again that the appointment of a watchman for the county jail is indispensable, and that such a watchman must be provided unless the prison inspector makes a written order to the contrary. Of

course, the statute gives the county commissioners or board of revenue, or like governing body the authority to fix his compensation, which must be reasonable. Therefore, unless there has been a written order from the State prison inspector to the contrary, your claim, if it is reasonable, should be and must be allowed for the services of such watchman. **Quarterly Report of Attorney General, Vol. II, p. 263.**

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 7, 1938

Hon. J. A. Carnley,
Judge of Probate,
Coffee County,
Enterprise, Alabama.

License — Slot Music Machine —

Owner of machine liable for license without regard to where machine is placed.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 22, 1938, in which you request my opinion as follows:

"I would like to have an opinion on the following question which has come up before this office.

"An individual owns a 5c slot music machine which he placed at the municipal owned pool and the City of Enterprise gets 25% of the receipts. The machine is owned by the individual. Would this license be due by the individual or would it be exempt? Who would be the proper one to pay the license on this machine if such a license is due?"

The license on slot music machines is levied by Schedule 154 of the Revenue Law of 1935, as amended by H. B. 70, approved February 2, 1937 (General Acts 1936-37, p. 32). Schedule 154, as amended, provides as pertinent as follows:

"For each machine for vending gum, candy, cigarettes, **music**, or on which a person is weighed, or other articles: Where machine is operated by pennies, one (\$1.00) dollar; where machine is operated by nickle or coins of larger denomination, eight (\$8.00) dollars. * * * "

You will note that the amended schedule also contains the following provision: "Any schedule of this Act in conflict with the provisions of this schedule are hereby repealed." The act referred to in the foregoing statement is, of course, the General Revenue Law of 1935. I find that Schedule 135, as amended by the General Acts of 1936, p. 232, also provides for a license on a slot music machine. This schedule must be held to be repealed, insofar as conflict exists by the foregoing quotation from the 1937 Act.

Your attention is also directed to the fact that the 1937 Act, *supra*, levies a license on "each machine". It therefore becomes the duty of the owner of

such machine to take out the license required by law upon the music machine. *Dunlap v. State*, 16 Ala. App. 440, 78 So. 638; Cert. Den. 202 Ala. 698, 80. So. 893.

In the *Dunlap* case, *supra*, the Court held that a license tax on a penny-in-the-slot machine used for vending chewing gum was not a license upon the chewing gum nor upon dealers in chewing gum, "but upon penny-in-the-slot machines, for whatever purpose or purposes they may be operated." Judge Samford speaking further for the Court of Appeals says:

"The chewing gum merchant can sell his wares in the regular way without being subject to the license, but if he elects to operate or use a device for which a license is required, **he pays the license on the device**, and not on the chewing gum. The law is not a prohibition of the use of the machine but merely places a license for its use, which is not in violation of constitutional provisions as to extent or uniformity of tax rate upon property or as to discrimination. *Phoenix Carpet Co. v. State*, 118 Ala. 143, 22 South. 627, 72 Am. St. Rep. 143."

Inasmuch as the slot music machine is not owned by the municipality operating the swimming pool but by a private individual, it becomes the duty of the individual to pay the license on the machine and not the municipality.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 7, 1938

Hon. B. M. Davis,
Tax Assessor,
Cherokee County,
Centre, Alabama.

Hon. J. W. Graham,
Tax Collector,
Cherokee County,
Centre, Alabama.

Taxation —

1. Costs of printed notices to be posted in five or more public places in each election precinct, by the Tax Assessor and Tax Collector, in accordance with the provisions of Sections 30 and 157 of the 1935 Revenue Act should be paid for by the county.

2. Costs of newspaper notice required to be given by the Tax Assessor and Tax Collector in accordance with the provisions of Sections 30 and 157 of the 1935 Revenue Act should be paid for by the county.

3. Costs of printed blanks to be used by Tax Collector in making written demand on delinquent taxpayers as provided by Section 164 of the 1935 Revenue Act should be paid for by the county.

Opinion by Assistant Attorney General Garrett.

Dear Sirs:

I have your letter which reads as follows:

"Section 30 of the Revenue Code of 1935 in part provides:

" 'The Assessor shall give at least ten days notice by advertisement in a newspaper, if there be one published in the County, and by bill posted in five or more public places in each election precinct, of the time when he will attend to receive the tax returns.'

"In attempting to comply with this requirement we as Assessor and Collector, respectively, jointly had a sufficient number of bills printed, for the purpose of posting at five or more public places in each election precinct, and submitted to the Court of County Commissioners the bill for the cost of printing the same. The Court of County Commissioners refused to pay this bill.

"Please give us your opinion if this bill for printing is a legal charge against the county, and if same can be paid by the Commissioners Court.

"In further compliance with said requirement of law, we as such Assessor and Collector, respectively, jointly gave ten days notice by advertisement in the Coosa River News, a newspaper published in Cherokee County, Alabama, of the time when we would attend to and receive tax returns. We submitted to the Court of County Commissioners the bill for advertising and said Court refused to pay the same.

"Please advise if this bill for advertising of said notice is a legal charge against the County, and if the Commissioners Court can order the same paid.

"Section 164 of the Revenue Code of 1935 provides:

" 'After the first day of January the Collector must make a demand in writing upon delinquent taxpayers, or their agents charged with the duty of paying their taxes, whenever they may be found, for the amount of taxes and fees and when unable to find them, to make a demand by registered mail directed to his last known place of residence or business, return card demanded.'

"In order to carry out this provision of the law the undersigned John W. Graham, as Collector, had printed a necessary supply of written demands to be mailed delinquent taxpayers. The bill for the printing of these written demands was submitted to the Court of County Commissioners and they refused to pay the same.

"Please advise if this bill for printing these demands is a legal charge against the county, and if the Commissioners Court has authority to pay the same."

The printed bills or notices to which you refer in the first part of your letter are the bills or notices which the Tax Assessor and Tax Collector are required to give by Sections 30 and 157 of the 1935 Revenue Act, respectively.

These sections require the Tax Assessor and Tax Collector, respectively, to visit each precinct of the county for the purpose therein stated, and to advertise these visits, unless relieved of such duty by proper resolution of the Court of County Commissioners. The advertisement of these visits required to be given must be both by publication in a newspaper and by bills posted at five or more public places in each election precinct.

Section 28 of the 1935 Revenue Act reads as follows:

"It shall be the duty of the courts of county commissioners or boards of revenue of the several counties in this state to supply the Tax Assessor, Tax Collector and such other tax officials or agents whose duty it is to assess and value property for taxation under this Article, with all necessary books, stationery and printed blanks for the proper conduct of their several offices."

This office has previously held in an opinion to Hon. Hunter Phillips, Tax Assessor, Choctaw County, Butler, Alabama, under date of February 21, 1938, Quarterly Report of Attorney General, Vol. X, page 103, that under said Section 28 the bills or notices required to be posted in each election precinct by the Tax Assessor and Tax Collector in accordance with the provisions of Sections 30 and 157, supra, should be paid for by the county, if said bills or notices are made on stationery or printed blanks. Therefore, it is my opinion that your bill for the printing of these bills or notices required by Sections 30 and 157, supra, is a legal charge against the county and should be paid for by the county.

You next ask whether or not a bill for the advertisement in a newspaper required to be given by the Tax Assessor and Tax Collector by Sections 30 and 157, supra, is a legal charge against the county.

In my answer to your first inquiry I have pointed out that Sections 30 and 157, supra, require the Tax Assessor and Tax Collector to give this newspaper notice.

The decisions of the Supreme Court of Alabama are to the effect that the county is liable for only those claims which the law imposes or authorizes to be contracted, but that it is liable for those claims. *Ensley Motor Car Co. v. O'Rear*, 196 Ala. 481, and cases therein cited.

In the instant case, the law imposes the duty upon the Tax Assessor and Tax Collector of giving this newspaper advertisement. Therefore, I am of the opinion that the county is liable for the expense of such newspaper notices, and that the bill for such notices should be paid by the county. It is further my opinion that the rate which should be paid for such notices is governed by Section 9262 of the Code of Alabama, 1923. Cf. Opinion to the Judge of Probate, Etowah County, Gadsden, Alabama, under date of September 8, 1930, Biennial Report of Attorney General 1928-30, page 916, wherein it was held that the costs of publishing the list of qualified electors of the county in a newspaper should be paid for by the county since the law imposes the duty upon the Judge of Probate of publishing such list in a newspaper in every even numbered year.

Your next question is whether or not a bill for the printing of blanks on which the Tax Collector makes written demand on a delinquent taxpayer in accordance with the provisions of Section 164 of the Revenue Act of 1935 is a legal charge against the county.

Section 164 of the 1935 Revenue Act provides:

"After the first day of January the Collector must make a personal demand in writing upon delinquent taxpayers, or their agents charged with the duty of paying their taxes, whenever they may be found, for the amount of their taxes and fees, and when unable to find them, to make a demand by registered mail directed to his last known place of residence or business, return card demanded. It shall be the duty of such delinquents forthwith to pay the taxes and fees assessed and charged against them. But failure to comply with the requirements of this Section shall not invalidate the title of any property sold for taxes."

It is my opinion that such a bill is a legal charge against the county and should be paid for by the county, under the authority of Section 28, *supra*. Opinion to Hon. Hunter Phillips, *supra*.

The holding of this opinion in answer to your second inquiry is not in conflict with the holding of the opinion to Hon. Hunter Phillips, *supra*. In that opinion, we were only dealing with the question of whether or not the county could pay the expenses, or any of them, incurred by the Tax Assessor and Tax Collector in the performance of the duties required of them by Sections 30 and 157, *supra*, respectively, under Section 28, *supra*, and were not dealing with, and did not consider, the question of whether or not the county could pay these expenses, or any of them, pursuant to any other provision of law.

The opinion to Hon. U. B. Sullivan, Tax Collector of Pickens County, under date of July 17, 1936, Quarterly Report Attorney General, Vol. IV, page 47, is modified to conform hereto.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 7, 1938

Hon. R. C. Derby, Tax Assessor,
Sumter County,
Livingston, Alabama.

Municipal Taxation.

Section 201 — Revenue Act of Alabama — Schedule 158.12, Section 348, Article 13, Revenue Act of 1935.

1. Tax Assessor of Sumter County, whose services are invoked by ordinance, dated July 20, 1938, to assess municipal taxes for the City of Livingston, is required to assess such taxes due on December 1, 1938, on forms to be furnished by the City.
2. Tax Assessor of Sumter County, in reporting to the Tax Collector the amount of municipal taxes due December 1, 1938, which he was, by ordinance of the City of Livingston, dated July 20, 1938, required to assess, must use separate abstract book to be furnished by the City of Livingston.
3. Assessment of automobile taxes for City of Livingston is controlled by the provisions of Schedule 158.12, Section 348, Article 13, Revenue Act of 1935.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Your inquiry of recent date, to which this opinion is addressed, is as follows:

"I am enclosing you copy of an Ordinance passed by the Town Council of Livingston on July 20th. I would like to have your opinion whether or not this ordinance would apply for the town tax for the year 1938. It was passed after the time set forth, both in Secs. 50 & 75 Revenue Acts 1935. I cannot see how the Assessor can perform any act of equalization after July 20th, as such work had been already completed on that date. Section 2124, Code of 1923, sets forth that after the first day of October cities and towns may levy taxes upon all property and subjects of taxation liable therefor. Section 3095 provides for the assessment of taxes due.

"The difference in the working of these two Sections brings up the thought that these two sections may apply one to each of the two towns or cities which have a different basis for assessment. The one for previous year, and the other for current year.

"Second, If this tax is to be handled just as would be a special district school tax, will I have to make separate copies of each and every assessment liable for the city tax, or can I place same on the original assessment sheet as in the case of special district school taxes? In the event you should rule that I should handle it all together from the State and County assessment lists, shall I put the same on the State Abstract book and how shall I notify the Collector of the amount of taxes he is charged with?

"These questions seem a little wild but there is nothing in the book that I can find setting forth any form for handling same.

"P. S. In case you rule that this has to be done by the Assessor for 1938, will or will not a special ordinance be required for the assessing of automobile taxes?"

Inasmuch as the ordinance of the City of Livingston, invoking the aid of Section 201, Revenue Act of Alabama, (formerly Section 3095, Code of 1923), which section, upon the aid thereof being invoked, requires you to assess municipal taxes, was not passed until July 20, 1938, at which time, as I assume from your letter, you had already completed your State and County assessments and your report thereof to the Tax Collector, it is my opinion that you would not be required to assess said taxes except upon forms to be furnished by the City of Livingston.

Amendment Number 8 to the Constitution of Alabama commands the valuations of property subject to municipal taxation of the City of Livingston to be "based on the valuation of such property as assessed for State taxes for the tax year ending on the 30th day of September, next succeeding the levy * * * ." I respectfully refer you to an opinion of this office dated December 14, 1936, addressed to Mrs. C. F. Hart, Tax Collector of Covington County, Andalusia, Alabama, reported in Vol. 5, Quarterly Reports of the Attorney General, p. 119, which has application to the valuations which you are required to use.

Although you may use the current assessments made for the State and County as a basis for the tax valuations of the municipal property in the City of Livingston, and even though you could lawfully include such assessments on the same blank which you use to make the State and County assessments, a point which I am not deciding at this time, you could not, in my judgment, after you have completed your assessments and the return thereof made for the Tax Collector, be required to amend the returns so as to include thereon the municipal assessments which you are required to make. The inclusion of the State, County and municipal assessments on one sheet, even though permissive, would certainly not be mandatory after State and County assessments have been made final. You would have no authority at this late date to amend the returns made by the taxpayers for State and County taxes, although you would be within your lawful authority, and are required, to assess the municipal taxes for the City of Livingston after completion of the assessments for State and County taxes.

I call your attention to the opinion to Mrs. C. F. Hart, *supra*, from which I quote as follows:

"Answering question two it is my opinion that there is no necessity to return the assessments to the city council where the assessments are made under Section 201 of the Revenue Code of 1935 or Section 3095 of the 1923 Code.

"Answering question three it would seem that the notice issued for state and county taxes would be sufficient to the taxpayer for city taxes as the valuation is identical.

"Answering question four I do not think in making these assessments for city taxes you are required to make any other report to the Board of Revenue, nor are you required to take any further action than that required for state and county taxes."

It is my opinion that the same reasoning which I have already set forth would apply to the report of such municipal taxes that you are required to make to the Tax Collector of your County. Such report should be on an abstract book to be furnished by the City of Livingston, as it is not feasible at this late date to change your abstract of the state and county taxes so as to include the amount of taxes due on municipal assessments, even though such inclusion is permissible — a point not pertinent thereto.

Answering your postscript, it is by opinion that the assessment of automobile taxes for the City of Livingston is controlled exclusively by the provisions of Schedule 158.12, Section 348, Article 13, Revenue Act of 1935.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 7, 1938

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

Subpoenas — When staff members of the Department of Public Health are amenable to subpoenas.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"From time to time members of this staff are summoned to appear in court in various parts of the State in either of two capacities: (1) They may be summoned to testify in some matter pertaining to the work of the department; or (2) They may be summoned as private individuals with reference to matters on which they have information. In either of these cases it is often very disrupting to the work of the department as those summoned may be engaged in a special technical project in a section of the State far removed from the scene of the trial.

"Under what circumstances, in each of the above cases, are staff members required to obey summonses?

"If a staff member is required to answer a summons, and such summons also orders him to produce certain records of the department, is it ever necessary for the member summoned to carry with him any public records; or must the person requiring same be content with certified copies of the record?

"The State Department of Health is custodian of certain records which are not, strictly speaking, public ones; for example, records of laboratory tests made for physicians. Is not the work done for individual physicians of a confidential nature and protected by the same rules of law as apply between physician and patient?

"In a specific case, a member of this staff received a subpoena duces tecum, directing him to bring the records concerning a Wassermann test on an individual who is now dead. The summons was issued in a civil case and was for the benefit of a former employer of the deceased. Should the record in such case be produced? In this connection attention is directed to Section 1111 of the Code of 1923."

When members of your staff are subpoenaed to testify in criminal cases, it is my opinion that they have to obey the summons of the court without exception unless, as provided for by Section 5624, Code of Alabama, 1923, their depositions may be taken. This, however, can only be done with the consent in writing of the defendant therein involved, as neither the legislature nor the courts can deprive a defendant in a criminal prosecution of the privilege of being faced by his accuser or of the right to compel the attendance of witness to testify in his behalf. *Bush v. State*, 168 Ala. 77, 53 So. 266.

In civil cases when members of your staff are summoned to testify as private citizens with reference to matters having nothing to do with their

official duties or their duties relative to their employment and they are within one hundred miles of the place of trial, they must obey the summons of the court and appear as a witness unless they come within the provisions of Section 7744, Code of Alabama, 1923, and the party who summons them consent to have their testimony taken by deposition. It is in the discretion of the party who subpoenas a witness as to whether or not he must appear personally or by deposition. If your staff members are over one hundred miles from the place of trial, they cannot be subpoenaed to appear personally unless Section 7735 of the Code of Alabama, 1923, is complied with.

In reference to members of your staff being called to appear in court to testify as a witness to matters pertaining to their official duties or their work in connection with their official capacity, it is my opinion that generally they do not have to appear. That is, when a member of your staff comes within the exception set forth in sub-division 6 of Section 7744, Code of Alabama, 1923, which provides in part as follows:

"Sub-division 6. When the witness is the governor, secretary of state, state treasurer, state auditor, attorney general, superintendent of education, commissioner of agriculture and industries, examiner of public accounts, or the head of any other department or bureau of the state government, * * * "

then their testimony must be taken by deposition.

You will note that this section names certain constitutional officers of the state and then contains the words, "or the head of any other department or bureau of the state government." In my opinion this refers to any department created by the executive, and to the bureaus created within such department, and includes also the heads of the bureaus appointed by the executive of each department. The above is strictly limited to civil cases.

When a member of your staff is subpoenaed to produce certain records of the department, it is my opinion that a distinction must be made between public records and the other records on file in your office. Generally public records can only be secured to be used as testimony pursuant to Section 2696 of the Code of Alabama, 1923, which provides:

"Section 2696. Public officers bound to give copies. — Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing."

Further, the copies can be secured only in the manner therein set forth. It is only under unusual circumstances that the original record itself must be produced since there is a further provision applicable to public records used as testimony in Section 7681 of the Code, which provides:

"Section 7681. Transcript of books kept in office of any public officer, evidence. — All transcripts of books or papers or parts thereof, required by law to be kept in the office, custody or control of any public officer, agent, servant, or employee of any municipality, city, county, or of the State of Alabama, or of the United States, when certified by the proper custodian thereof, must be received in evidence in all courts; and it is no objection to such transcript that the book from which it is taken is a copy of office books belonging

to the United States. All such officers under jurisdiction and laws of the State of Alabama, and counties and cities therein, shall furnish all such transcripts of any documents, official books and papers in their possession, custody or control, when requested to do so by any person, firm or corporation, tendering to such officer or custodian of such records, the proper amount of fees and charges required or necessary to pay for the making of such transcripts."

The distinction to be made is that made by Section 2696, *supra*, in the provision, "public writings which the public has a right to inspect;" and it is my opinion that this refers to public records which have been defined as follows:

"Strictly speaking, a public record is one made by a public officer in pursuance of duty, the immediate purpose of which is to disseminate information or serve as a memorial of official transactions for public reference." **People v. Harnett**, 226 N. Y. S. 338.

See also opinion of this office addressed to Hon. Henry S. Long, President, State Tax Commission, dated July 11, 1935.

It is my opinion therefore, that your department only has to supply certified copies of public records kept by your department that you are not under a duty to supply copies of laboratory tests made for physicians or Wassermann tests made for individuals, unless the general public has a right to inspect these records, as it has been held in the case of **People v. Harnett**, *supra*, at p. 341.

"Reports of private individuals to government officials, even pursuant to a statute, correspondence of such officials in matters relating to private affairs of a citizen, although in connection with public business, or memoranda of public officers for their own convenience, are not public documents or records, unless made so by statute.

"It would be a startling proposition to public officers, and to the public as well, if they were informed that all citizens had the right in the absence of statute to the contrary, to search the files and records of all public officers, as it might suit their fancy."

However, if such reports of laboratory tests are competent legal evidence in any case, the production of same, may be required by a subpoena duces tecum under Section 7776 of the Code of 1923. This applicable to Wassermann test reports as well as others. Although Section 1111 of the Code of 1923 treats such reports as confidential, such, in my opinion does not except them from being competent legal evidence in some cases.

Please be further advised that there are no privileged communications between doctors and patients in Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 9, 1938

Hon. Chas. W. Lee, State Comptroller,
Capitol.

Sheriffs — Elmore County —

Under Local Acts 1935, p. 7, and Local Acts 1936, p. 33, Sheriff of Elmore County held authorized to appoint two additional deputies and the Commissioners Court can pay such two additional deputies according to the terms of the Local Acts above referred to.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of August 3, 1938, in which you request my opinion as follows:

"Please refer to Local Acts 1935, page 7, and Local Acts 1936, page 33, such Acts dealing with additional Deputy Sheriffs of Elmore County and advise me as follows:

"1. Under the two Acts can the Sheriff of Elmore County appoint two additional Deputies and the Commissioners Court pay such two additional Deputies \$1,500.00 per year for one as provided by the Acts of 1935 and \$1,200.00 for the other as provided by the Acts of 1936?

In reply, I wish to advise you that in my opinion your request must be answered in the affirmative. You refer to Local Acts 1935, page 7, which provides as follows:

"No. 69. — Section 1. That the Sheriff of Elmore County, Alabama is hereby allowed an additional deputy to the deputy or deputies now provided by law, which said deputy sheriff shall be appointed by the Sheriff of Elmore County, Alabama, and said deputy shall be located at, and shall reside during the period of his appointment as such, at Tallassee, Alabama; and he shall receive a salary of \$1500.00 per annum, to be paid in twelve equal monthly installments out of the general fund of said Elmore County; and the said deputy shall be eligible to perform the duties of deputy sheriff anywhere in said County.

"Section 2. That on the first day of each month, a statement of the name and amount due the said deputy sheriff shall be furnished to the Commissioners Court of Elmore County by the Sheriff; and it shall thereupon be the duty of the said Court to order a warrant drawn upon the general fund of the County, payable to the said deputy sheriff, for the amount of one month's salary, as hereinabove provided.

"Section 3. That said deputy sheriff shall, before entering upon his duties as such deputy sheriff, take and file with the Judge of Probate of Elmore County the oath of office required by law, and in accordance with the provisions of the Constitution of Alabama, and shall execute and file a bond with good and sufficient surety in the sum of not less than one thousand dollars and not more than three thousand dollars, the amount of same to be

fixed by the Sheriff, to be payable to and approved by the Sheriff of said County, and conditioned for the faithful performance and discharge of his duties as such Deputy Sheriff.

"Section 4. That all laws and parts of laws in conflict with the provisions of this Act, be, and the same are hereby expressly repealed; and that this Act shall be in full force and effect from and after its passage by the Legislature and approval by the Governor.

"Approved May 20, 1935."

You refer to Local Acts 1936, page 33, which provides as follows:

"Section 1. That the sheriff of Elmore County is hereby allowed an additional deputy sheriff, to be appointed by said sheriff and to hold office at the pleasure of the sheriff, who shall terminate said appointment for any cause sufficient in the discretion of the sheriff; provided that when any such deputy is removed, dies or resigns, the sheriff may appoint a successor who shall hold office and be subject likewise to all the provisions of this act.

"Section 2. The compensation of said deputy is hereby fixed at One Hundred Dollars per month, payable out of the general fund of the county, upon presentation of claim for such compensation, monthly, to the court of county commissioners of said county; provided that payment shall be at the discretion of the said court.

"Section 3. Before entering upon the duties of his office said deputy shall execute a bond, conditioned and approved as required by law for bonds required of sheriffs, in the sum of \$1,000.00 payable to the State of Alabama, and recorded and filed in the probate office of said county.

"Section 4. If any section or provision hereof is invalid it shall not affect the valid provisions of this act."

You will note that in the above quoted Local Act of 1935, definite authority is granted for the employment of a deputy sheriff who shall reside in Tallassee, Alabama. The Act further definitely provides for the compensation and method of payment or compensation to the said deputy sheriff. I have examined the Local Act of 1936, quoted above and in my opinion there is no conflict between the two local acts referred to and quoted herein. In my judgment, these two acts are separate and distinct and are intended to provide for two different officials. You will note that the Local Act of 1935, quoted supra, provides for a special deputy sheriff designated as one having residence in Tallassee, while the Local Act of 1936, quoted supra, provides generally for an additional deputy. No reference is made to any prior act and no repealing clause appears in the Local of 1936, quoted supra.

It has been held that a local act providing for additional deputy sheriffs is not violative of Sections 68, 96, 104 (24) 105 and 281 of the Constitution of 1901 — **Court of County Commissioners v. Lightner**, 225 Ala. 22, 141 So. 908 and cases cited therein; **Quarterly Report of Attorney General** (Vol. I, p. 3 and p. 280).

The premises considered, it is my judgment that the two acts referred to are independent and are not in conflict. It is further my opinion that definite authority exists for the appointment of the deputy named at the salary specified by the terms of the above named local laws.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 9, 1938

Hon. W. H. Quillin, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Costs — Defendant cannot be imprisoned for a term in the county jail to pay the costs of court but he may be sentenced to hard labor to pay costs. Section 5291, Code of Alabama, 1923.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge your letter of August 20, 1938, which is as follows:

"If a defendant is fined \$5.00 and costs for public drunkenness in the Law & Equity Court, the costs amounting to \$22.85, and the court sentences the defendant to ten days imprisonment in county jail to pay the fine as provided by Section 5290 Code 1923, does the court also have a right to sentence the defendant to a certain number of days imprisonment in county jail to pay the costs, said defendant having failed to pay the court costs?

"Does a court have a right to sentence a defendant to imprisonment in the county jail to pay court costs in misdemeanor case, in the event said defendant fails to pay court costs upon conviction? What section of the Code provides for the rate per day to be used in figuring the number of days imprisonment in the county jail required to pay court costs in misdemeanor cases?

"If a defendant pays court costs in a misdemeanor case by serving a jail sentence, who pays these costs into the fine and forfeiture fund of the county and how do the officers get their costs in such cases?"

In answer to your first two questions, it is my opinion that the court cannot sentence a defendant to imprisonment for a term in the county jail to pay the costs of court, but he may be sentenced to hard labor under Section 5291, Code of Alabama, 1923.

If a defendant is convicted of a misdemeanor and a fine is imposed, if the fine and costs are not paid or judgment confessed therefor, the court should proceed as follows:

The judge may sentence the defendant to jail or to hard labor to pay the fine in accordance with Section 5290 of the Code of Alabama, 1923, which section has been construed as applying only to sentences on account of the fine. — *Williams v. State*, 55 Ala. 166; *Ex parte Hill*, 122 Ala. 114.

The judge must sentence the defendant to hard labor to satisfy the costs. The only method of enforcing payment of costs, if not paid or judgment confessed is by sentence to hard labor for the county. Section 5291 of the Code of Alabama, 1923, provides as follows:

"Section 5291. When additional hard labor imposed for costs; rules in reference to. — If, on conviction, judgment is rendered against the accused that he perform hard labor for the county, and if the costs are not presently paid or judgment confessed therefor, as pro-

vided by law, then the court may impose additional hard labor for the county for such period, not to exceed ten months, as may be sufficient to pay the costs, at the rate of seventy-five cents per day, and the court must determine the time required to work out such costs at that rate; and such convict must be discharged from the sentence against him for costs on the payment thereof, or any balance due thereon, by the hire of such convict, or otherwise; and the certificate of the judge or clerk of the court in which the conviction was had, that the costs, or the residue thereof, after deducting the amount realized from the hire of the convict, have been paid, or that the hire or labor of the convict, as the case may be, amounts to a sum sufficient to pay the costs, shall be sufficient evidence to authorize such discharge?"

It will be noted that the above quoted section states:

"If, on conviction, judgment is rendered against the accused that he perform hard labor for the county, * * *

However, this has been contrued as being sufficiently broad to include cases where the defendant was convicted of a misdemeanor punishable by fine only, and there was no preliminary judgment imposing hard labor on nonpayment of the fine. — *Ex parte Etheridge*, 212 Ala. 466, 103 So. 66; *Tollison v. State*, 23 Ala. App. 528, 128 So. 464; *Ex parte Joice & Smith*, 88 Ala. 128.

There is no section in the Code of Alabama providing for the rate per day in computing the number of days imprisonment in the county jail required to pay court costs in misdemeanor cases for the reasons set out above. Section 5291, *supra*, applies only to sentences to hard labor for the county.

Since a defendant cannot pay court costs in a misdemeanor case by serving a term in jail, I believe that your last question is adequately answered.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 9, 1938

Dr. A. H. Collins, Superintendent,
Department of Education.
Montgomery, Alabama.

Schools — County Board of Education authorized to make appropriation to county health departments to be used for public health services connected with school system from funds not specifically covered by Subsection 3 of Section 2 of the Minimum Program Act (Gen. Acts, 1935, pages 714, 717).

Opinion by Asssistant Attorney General Loeb.

Dear Sir:

I have your letter of August 1, 1938, in which you request my opinion as follows:

"In an opinion under date of June 25, 1938, to Mr. V. H. Wood, County Superintendent of Education, Franklin County, Russellville, Alabama, you held that a county board of education is without authority to make appropriation out of the minimum program fund to county health departments for public health services.

"Will you please advise me at your earliest convenience whether or not this opinion applies to all school funds available for appropriation by county boards of education."

In reply, I wish to state that the opinion referred to by you is applicable only to the minimum program fund and does not apply to those funds not included therein.

I specifically call your attention to Section 3 of the Minimum Program Fund Act (General Acts, 1935, page 714) relating to the method of determining the funds available to provide the program. Section 3 of said act provides as follows:

"3. DETERMINING THE FUNDS AVAILABLE TO PROVIDE THE PROGRAM.—The funds available to meet the cost of the seven months minimum program or of the program for whatever minimum term may be established by the State Board of Education shall be determined as follows: To the sum total of all funds from State appropriations and apportionments, available for elementary and secondary schools in any and all school systems in the county, add the total yield of an assessment of the three mill district tax in the several districts covering the whole county and the total yield of an assessment of two mills of a county-wide school tax on all taxable property of the county. The total of these funds shall be considered the total funds available to meet the total cost of the seven months minimum program."

You will note that Section 3 includes in the minimum program fund all of the three-mill district tax authorized by Section 2 of Amendment III of the Constitution, but only includes two mills of the county-wide school tax authorized by Section I of said Amendment III. As you know, the counties are authorized to levy a special one-mill county school tax (Sections 253-260 of the School Code, 1927) as well as the special three mill county school tax authorized by Section 1 of Amendment III, of the Constitution. You will thus see that while there are possibly available to the county, funds from two three-mill levies and a one-mill levy, aggregating seven mills, only five mills of these seven are included in the minimum program fund. Three mills of the district tax are specifically included while the special one-mill tax and one mill of the county-wide three-mill tax or two mills of the county-wide three-mill tax are left without the scope of the minimum program fund and in my opinion may be used for "public school purposes." (Quarterly Reports of Attorney General, Vol. IX, pages 57, 60).

The question now arises as to whether or not an appropriation to the County Health Department for the exclusive use and benefit of the schools by the County Board of Education for public health services is an appropriation for "public school purposes." By Sections 8, 86 and 98 of the School Code of Alabama, educational matters affecting the county school system and the general administration and supervision of the public schools and of the educational interests of each county, are vested in and are under the control of the County Board of Education. The purpose of the entire educa-

tional system is to maintain efficient free public schools within the State of Alabama and within each county. As will be shown, the protection and promotion of the health of the school children is a necessary adjunct to this expressed purpose and in my judgment the county boards of education by implication possess the power to make such appropriations as are required to accomplish that purpose. To paraphrase the statement in *State v. Brown*, 128 N. W. 294, education of a child means much more than merely communicating to it the contents of text books, but even if the term were to be so limited, some discretion must be used by the teacher in determining the amount of study of which each child is capable. The physical and mental powers of the individual are so interdependent that no system of education, although designed solely to develop mentality, would be complete which ignored bodily health. In line with these principles there has been established in the Department of Education a division of physical health education (Section 20 of the School Code, 1927), and Article XL (Sections 619-625) of the School Code of 1927 provides for the cooperation of county boards of education with county boards of health in the promotion of a physical program for the school children of the county.

The provision contained in the school code for the physical welfare of the children is peculiarly efficacious, for as a general rule, the immaturity of children renders their mental efforts largely dependent upon physical conditions. The school authorities and the teachers coming directly in contact with the children should have an accurate knowledge of each child's physical condition, for the benefit of the individual child, for the protection of the other children with reference to communicable diseases and conditions, and to permit an intelligent grading of the pupils.

All of the foregoing considerations, as well as many others unnecessary to mention, convince me that an appropriation to the County Health Department for the exclusive use and benefit of the schools, by the County Board of Education out of either that part of the Constitutional three-mill county-wide school tax available, or from the special county one-mill tax authorized by Section 253 et. seq., of the School Code, or such other funds as may be available to the county and are not specifically otherwise earmarked by the Minimum Program Act or by Section 3 of Act No. 326, approved September 2, 1935 (General Acts, 1935, pages 751, 752) is an expenditure for "public school purposes" and, therefore, justifiable under the law.

In all that has been said hereinabove, it is assumed, of course, that the appropriation to the County Health Department by the County Board of Education will be expended by the County Health Department exclusively for health work in connection with the County School System. Any other use would, in my opinion, be illegal.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

Hon. Gaston Scott, President,
Alabama Highway Commission,
Capitol.

September 9, 1938

Highways and Highway Department — Act No. 339 — General
Acts of 1935, p. 773 — Paving of streets through municipalities.

1. The State Highway Department of Alabama is authorized to pave, from curb to curb, irrespective of the width, the roadway, including the parking area, if a part of the roadway and used as such, of municipal streets "which will serve to connect the State Highway constructed or repaired by the State Highway Department within any town or municipality in the State of Alabama."

2. State Highway Department has no authority to install curb and gutter, or to pave sidewalks, on the streets of a municipality, except upon which a State educational or eleemosynary institution or the property thereof may front or abut.

Opinion by the Attorney General.

Dear Sir:

Reference is made to your inquiry from which I quote as follows:

"Your interpretation of the authority vested in the State Highway Commission by an Act of the Legislature on page 775 of the 1935 Acts, is requested. The Department wishes to be advised of the authority to construct and pave sidewalks and install curb and gutter in a municipality where such width between the curbs exceeds the paved width of the highway connected by such streets of the municipality. Reference is also made to the 1927 Highway Code in which a similar provision was also incorporated. Reference is made in the 1935 Act to a limit of 20 feet. Does this restrict the construction to an actual width of 20 feet within municipalities, or if the street is wider than the Department pave the entire width from curb to curb or is its authority restricted to 20 feet width? In many instances the actual roadway is 20 feet but the parking area on both sides would add several feet. Would it be permissible to pave this parking area under the above cited statute? Does it have authority to pave sidewalks beyond the curb and gutter along such streets?

"Please give this matter your prompt attention and advise as the Bureau of Public Roads has requested that we obtain a ruling from your office on this question."

The authority of your department for paving the roadways in a municipality, or for the construction of sidewalks, curbs and gutters, within the corporate limits of a city or town, is set forth and defined in Act No. 339, General Acts of 1935, p. 773, which is amendatory of Section 6 of Act No. 347, General Acts of 1927, p. 348. For the purpose of comparison, I am quoting Section 6 of the original Act along with the same section of the amendatory act, *supra*. The underscored words in the original section, as quoted herein, are not included in this section as amended, while the underscored words of the amended section, as quoted therein, were not included in the original section.

Section 6 of the original Act No. 347, *supra*, is as follows:

"DUTIES AND POWERS OF COMMISSION. — The state highway commission shall consider and determine all questions relating to the general policy of the state highway department and the conduct of its work and in the performance of its duties. It shall be the duty of the department to designate the roads to be constructed, repaired and maintained and to construct, standardize, repair and

maintain roads and bridges of this state; and shall have authority to make contracts, or agreements, to construct, or pave the roadway only of the street or streets, which will serve to connect the State Highways constructed or repaired by the State Highway Department, within any town, or municipality, **the population of which shall not exceed five thousand inhabitants, as given by the last Federal census;** and may also cooperate or contract with any municipality, or county **authorities** in the paving or improving **the roadway only**, of any street or highway upon which a State Educational or Eleemosynary Institution may front or abut, provided that, where such State Educational or Eleemosynary Institution, or the property thereof, fronts or abuts on both sides of the street or highway, **the roadway of which is to be paved or improved**, the State Highway Department is hereby authorized to, and shall, expend an amount of money sufficient to cover the entire cost thereof, and where such institution, or the property thereof, fronts or abuts on only one side of such street or highway, the said Department is hereby authorized to, and shall, expend an amount of money sufficient to cover only one half of the cost thereof; the State Highway Commission is authorized and empowered and may, with the approval of the Governor, enter into contract by bond or policy, with an Insurance Company authorized to do business in this State, covering a certain amount to be paid to the employees of the State Highway Department, actually engaged in the Construction, Maintaining or Repairing of Public Roads and Bridges, who by accidental means may be killed or injured. Provided that the amount paid to any such party on account of accidental death, or injury shall not exceed the amount or amounts as provided by the Compensation Act of this State. The premium upon such bond or policy shall be paid out of the funds of the State Highway Department as provided by law; and to that end and for that purpose the Department may with the consent and approval of the Governor disburse any monies hereby or otherwise appropriated or set apart for the construction, repair or maintenance of the public roads, bridges and highways of this State."

Section 6 of the amendatory Act No. 339, supra, reads as follows:

"DUTIES AND POWERS OF COMMISSION. — The State Highway Commission shall consider and determine all questions relating to the general policy of the State Highway Department and the conduct of its work and in the performance of its duties. It shall be the duty of the department to designate the roads to be constructed, repaired and maintained and to construct, standardize, repair and maintain roads and bridges of this State; and shall have authority to make contracts or agreements to construct, or pave the roadway only of the street or streets, which will serve to connect the State Highway constructed or repaired by the State Highway Department, **within any town, or municipality in the State of Alabama, and in such towns or municipalities in which the State Highway Commission has not designated the street or streets which are a part of the State Highways constructed or repaired by the State Highway Department** it shall be the duty of the State Highway Commission to designate such street or streets and where the roadway of such street or streets was **not in the corporate limits of such municipalities prior to the 26th day of August, 1927, but subsequently included in the corporate limits thereof by extending the city limits of such municipality by an Act**

of the Legislature, and which street or streets have been improved and paved with hard surface paving at the expense or credit of such towns or municipalities, or of the property owners owning property abutting such street or streets, the State Highway Commission shall make such contracts or agreements as may be necessary to provide for payment by the State of the actual cost of such hard surfaced paving for a width of twenty feet, provided that the total amount shall not exceed \$50,000.00 for all of such towns or municipalities in which the city limits have been extended since August 26, 1927, by an Act of the Legislature, and the amount of \$50,000.00 shall be prorated among such cities and towns in proportion to the amount actually expended by them, and may also cooperate or contract with any municipality or county in the paving or improving of any street or streets, highway or highways, walkway or walkways upon which a State educational or eleemosynary institution or the property thereof may front or abut, provided that where said State educational or eleemosynary institution or the property thereof fronts or abuts on both sides of such street or streets, highway or highways, walkway or walkways, the State Highway Department is hereby authorized to and shall expend an amount of money sufficient to cover the entire cost thereof, provided further that where such institution or the property thereof fronts or abuts on only one side of such street or streets, highway or highways, walkway or walkways the said Department shall expend an amount of money sufficient to cover only one-half of the cost thereof. Provided, however, in such case, with the special approval of the Governor, said Department shall be authorized to expend a sum of money sufficient for the entire cost; and provided further the said Department may also, with the special approval of the Governor, improve or pave any street or streets driveway or driveways (including curb and gutter) and walkway or walkways on, by or through the grounds upon which a State educational or eleemosynary institution is located and to pay the entire cost thereof, the State Highway Commission is authorized and empowered and may, with the approval of the Governor, enter into contract by bond or policy, with an Insurance Company authorized to do business in this State, covering a certain amount to be paid to the employees of the State Highway Department, actually engaged in the Construction, Maintaining or Repairing of Public Roads and Bridges, who by accidental means may be killed or injured. Provided that the amount paid to any such party on account of accidental death, or injury shall not exceed the amount or amounts as provided by the Compensation Act of this State. The premium upon such bond or policy shall be paid out of the funds of the State Highway Department as provided by law; and to that end and for that purpose the Department may with the consent and approval of the Governor disburse any monies hereby or otherwise appropriated or set apart for the construction, repair or maintenance of the public roads, bridges and highways of this State."

It is my opinion that you are authorized, by the aforequoted amendatory act, to pave, from curb to curb, irrespective of the width, the entire roadway, including that portion set aside as a parking area, if a part of the roadway and so used, of municipal streets "which will serve to connect the State Highway constructed and repaired by the State Highway Department, within a town or municipality in the State of Alabama." This authority is granted by the specific terms of the amendatory act, in which I can find no restric-

tion as to the width of such paving. The width of twenty feet mentioned in the Act has reference to certain reimbursements authorized to be made to municipalities who have theretofore expended certain funds in making street improvements. Whether or not the parking area is a part of the roadway and so used is a question of fact.

I can find no authority contained in the amendatory act, supra, or otherwise, for your Department to pave sidewalks or to install curb and gutter, in a municipality, except on streets upon which the property of a State educational or eleemosynary institution fronts or abuts. In the latter instance, you are authorized to construct sidewalks, curb and gutter in strict conformity with the terms of the aforequoted amendatory act.

The specific language of the original and amendatory acts granting authority to pave the sidewalks, and to install curb and gutter on streets upon which State educational or eleemosynary institutions front or abut, by implication excludes participation by the Highway Department in other projects of a similar nature on streets upon which the property of such institutions does not front or abut.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 9, 1938

Hon. R. J. Goode, Commissioner,
Department of Agriculture and Industries,
Capitol.

Agriculture and Industries —

Agricultural Fund may be expended for the purpose of acquiring, establishing and providing markets for farm products and increasing and encouraging sale of said products, by establishing and maintaining an economic and efficient distribution and marketing center, under the facts set out.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of July 1, 1938, which is as follows:

"I request your opinion as to the authority of the Commissioner of Agriculture & Industries in the following matter:

'Has the Commissioner of Agriculture & Industries, with the approval of the State Board of Agriculture, authority to expend money from the Agricultural Fund for the purpose of acquiring, establishing and providing markets for farm products and increasing and encouraging the sale of such products.'

"The purposes are to provide physical facilities for establishing and maintaining an economic and efficient distribution and marketing center in the City of Birmingham, or other suitable point for the purpose of furnishing suitable, expeditious and economical handling

of farm products from producers to consumers and in reaching advantageous markets, both Intra-State and Inter-State, through the assembling and concentration of products from the farms of Alabama; to bring together said products for the purpose of rendering standardization in grades and packages possible, expeditious and economical; and to aid in the inspection and regulation of said products and the marketing of the same."

I am of the opinion that your inquiry should be answered in the affirmative.

In reference to the creation, expenditure and control of the Agricultural Fund, I wish to refer you to Sections 24, 25 and 26 of Act No. 13, H. 61, approved January 31, 1935, (General Acts 1935, p. 12), which sections amend sections 484, 487 and 488 of the Agricultural Code of 1927, respectively. These sections, as amended, are as follows:

"Section 24. That Section 484 of the 'Agricultural Code of Alabama', of 1927, be and the same is hereby amended so as to read as follows: Section 484. **AGRICULTURAL FUND.** — Wherever provision is made in this code for the collection of any fee or license or the imposition of any fine or penalty for the violation of any provisions of this Code without providing for the disposition of the proceeds derived therefrom, such proceeds shall accrue to the Agricultural Fund. The Agricultural Fund shall include all funds available from every source for the administration, enforcement or making effective the purposes of the provisions of the laws included in the Agricultural Section of this Code. All such funds shall be paid into the State Treasury and be kept intact, liquid and in trust, subject only to the requisitions of the Department of Agriculture and Industries and shall not be subject to any allotment or proration of appropriations for the benefit of any other department, institution or other State agency, or for any other purposes, or for use in any other manner, than as provided in Section 488 of the 'Agricultural Code of Alabama' as amended by this Act. The term 'Agricultural Department Fund', whenever used in this Code, shall mean 'Agricultural Fund'."

"Section 25. That Section 487 of the 'Agricultural Code of Alabama', of 1927, be and the same is hereby amended so as to read as follows: Section 487. **PURPOSES FOR WHICH AGRICULTURAL FUND USED.** — The Agricultural Fund shall not be expended upon any work or activity of any department, institution, bureau, commission, board or other State agency, which work or activity has been recognized or defined in Article 4 of the 'Agricultural Code of Alabama', which said Article contains a declaration of the field of work or activity of each agricultural function of the State, as the proper function of any agency other than that of the Department of Agriculture and Industries, or which is assigned, to any other such department, institution, bureau, commission board or other State agency than the Department of Agriculture and Industries, or which is not definitely assigned to and defined as a part of the proper work of said Department. Said fund shall be expended exclusively for the expenses of the regulatory control and administrative work of the Agricultural Section of the Department of Agriculture and Industries as that work is defined in said declaration of said field of work."

"Section 26. That Section 488 of the 'Agricultural Code of Alabama,' of 1927, be and the same is hereby amended so as to read as follows: Section 488. CONTROL OF AGRICULTURAL FUND. — The Commissioner of Agriculture and Industries, with the approval of State Board of Agriculture, shall use the Agricultural Fund in accordance with the provisions of law for the support and expense of the regulatory control and administrative work of the Agricultural Section of the Department and in such manner as said Board deems will best effect the purposes of all laws included in said Agricultural Section. The Commissioner of Agriculture and Industries, with the approval of the State Board of Agriculture, shall direct the expenditure of said fund, it being the purpose hereof to fully vest exclusive, direct and effective, financial supervision and control over the use of said fund for the work and activities assigned to the Agricultural Section of the State Board of Agriculture."

It will be noted that the Agricultural Fund may be expended for expenses of "regulatory control and administrative work" of the Agricultural Section of the Department of Agriculture and Industries as that work is defined in said declaration of said field of work. Therefore, it is necessary to determine what is included in the definition of "regulatory control and administrative work."

"Regulatory control and administrative work" is defined in Section 23 of the Agricultural Code of 1927, which is as follows:

"Section 23. REGULATORY CONTROL AND ADMINISTRATIVE WORK. — Regulatory control and administrative work for the purposes of this plan has reference to the administration of laws and regulations, rendering service pertaining thereto and performing other executive functions of the state pertaining to agriculture. Typical of this line of work is livestock sanitation, including quarantines and control of outbreaks of disease; plant disease and regulation, including orchard and nursery inspection and control of outbreaks; dairy and food control, and inspection of seed, feed, fertilizer, and other products; conservation of natural resources; adoption of standard grades for agricultural products and containers thereof; conducting fact-gathering studies of existing conditions as to supplies, production, market conditions, costs of services, prices, complaints, etc., for the purpose of acquiring and disseminating information which is essential to law enforcement or administration; and presentation to the public of the control, regulative and administrative problems which this function is to promote and for which it is to be responsible."

The above quoted section recognizes an assignment to the Department of Agriculture and Industries for execution of three classes of agricultural functions of the State. The first expressly named is the administration of laws and regulations. The second expressly named is rendering services pertaining to the administration of laws and regulations. The third is a performance of "other executive functions" of the State pertaining to Agriculture, excepting of course, such other executive functions of the state relating to agriculture as may have here been expressly assigned to other agricultural agencies as part of their expressed functions. Many provisions of the law contained in the Agricultural Code, refer to authority conferred upon the Commissioner of Agriculture to render services with reference to the pro-

motion, protection and development of the agriculture of the State, as distinguished from those provisions of the Code referring to the administration of laws and regulations and services pertaining to said administration.

"Other executive functions of the state", as used in Section 23, *supra*, clearly, in my opinion, includes those functions provided for in Article 30 of the Agricultural Code of 1927, which pertains to marketing. "Marketing" is defined in Section 335 of the Agricultural Code of 1927, which provides as follows:

"Section 335. DEFINITION. — For the purposes of this Article the word 'marketing' shall be construed to include preparing for market, transporting, storing, consigning, buying for the purpose of manufacture for sale, offering for sale, selling, soliciting, consigning or receiving on consignment. 'Agricultural products' shall include any horticultural, viticultural, dairy, bee, poultry, livestock, meat, dried, canned, preserved, or processed fruits or vegetables, fresh or salt water products, and any farm product and packing house or mill product designed for food."

It will be seen from the above that "marketing" includes: "preparing for market, transporting, storing, consigning, buying for the purpose of manufacture or sale, sale, selling, soliciting, consigning or receiving on consignment." These purposes or functions are, in my opinion, sufficiently broad to authorize an expenditure of the "Agricultural Fund" for the purposes set out in your inquiry

As above stated, the "Agricultural Fund" may be expended for expenses of "regulatory control and administrative work," which includes other "executive functions of the state" pertaining to agriculture. "Other executive functions of the state" includes the functions of "marketing", which definition is sufficiently broad to authorize the expenditure in question. Therefore, in my opinion the "Agricultural Fund" may be used for the purposes of acquiring, establishing and providing markets for farm produce and increasing and encouraging the sale of such products by the establishment of a market center in the manner set out in the inquiry.

Moreover, such a central market would facilitate to a great degree, the matter of inspection, grading, regulation and control of farm products.

The above is in accordance with an opinion of this office rendered to the Board of Commissioners, Madison County on July 3, 1935, which held that the county could legally appropriate money to build a market house for the purpose of promoting agriculture in said county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 12, 1938

Hon. A. H. Collins,
State Superintendent of Education,
Capitol.

General Contractors — A County Board of Education may let a contract for construction of a building to a general contractor, which said general contractor had been licensed by the State Licensing

Board for General Contractors and had an application pending before said Board for a renewal of the license (it having expired), which had not been acted upon, at the time bids on the project were open, when said general contractor has had his license renewed by said Board at the time the contract for the construction of said project is awarded.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 6, 1938, as follows:

Please give me an opinion covering the following question which arises in Talladega County.

"1. The Talladega County Board of Education asked for bids on the contract of a building which bids were received on the _____ day of _____, 1938.

"The firm of Croley, Boynton and Boynton were the low bidders on the project, which was to be financed as a P. W. A. project. This partnership had previously been licensed as general contractors in Alabama and had application pending for a new license at the time the bids were opened, but such application had not been acted upon.

"The Board of Education did not award the contract but postponed action until the 6th day of September, 1938, and during the interim said partnership of Croley, Boynton and Boynton were duly licensed as general contractors in every respect. If the contract is awarded to this firm it will amount to more than \$1,100.00 saving to the Talladega Board of Education.

"Please advise me if the Board of Education of Talladega County can award this contract to said Croley, Boynton and Boynton, low bidders on same, they having substantially complied with the law requiring a license for general contracting."

It is my information that this contract has not yet been awarded.

In my opinion, the Board of Education of Talladega County has the authority to award the contract in question to the firm mentioned in your letter of inquiry.

If the amount of the project to be constructed is in excess of \$10,000.00, then the general contractor on the project and the awarding authority are subject to the provisions of the act governing general contractors, which is Act No. 297, General Acts, 1935, page 721, approved September 2, 1935, and effective sixty days after its approval. (Section 1 of said Act.) I assume that the amount involved is such as would bring them within the terms of said act.

As pointed out by this office in an opinion to Hon. Ed Pettus, Secretary and Treasurer, State Licensing Board for General Contractors, Montgomery, Alabama, under date of August 30, 1938, a general contractor who bids on projects within the State of Alabama should comply with the law governing general contractors and should be licensed by the State Licensing Board for General Contractors before bidding on such projects within the State of Alabama; and an awarding authority, in this case, the Board of Education

of Talladega County, is charged by the provisions of said act with issuing plans and specifications or proposed forms to, and considering bids from, only licensed general contractors. However, we also held in said opinion that there was no penalty placed upon such an awarding authority for failure to comply with the provisions of said act, and that the Board would have no recourse whatever against an awarding authority if it issued plans or specifications or proposed forms to, and accepted bids from, a general contractor who had not been licensed by the Board.

The provisions of said act dealing with the duty of awarding authorities are found in the following part of Section 14:

"All architects and engineers preparing plans and specifications for work to be constructed in the State of Alabama, shall include in their invitations to bidders and in their specifications a copy of this act or such portions thereof as are deemed necessary to convey to the invited bidder, whether he be a resident or non-resident of this state and whether a license has been issued to him or not, the information, that it will be necessary for him to show evidence of license before the bid is considered * * *."

and in Section 15 which provides:

"No awarding authority or its agent shall issue to other than a licensed general contractor, or his authorized representative, plans or specifications or proposed forms, where these are required; and where bids are to be received on the forms furnished by the awarding authority, no proposal forms or plans or specifications shall be issued to anyone except a licensed general contractor or his representative."

Even if it might be held that the general contractor here under consideration has technically violated the provisions of the act governing general contractors, by bidding on a project after his license as a general contractor had expired, and before his application for a renewal thereof had been acted upon by the Board, and that the awarding authority has violated the provisions of the act by issuing plans or specifications or proposed forms to it and receiving bids from it (questions which it is not here necessary for us to decide), it is my opinion that in any event the County Board of Education of Talladega County may now award the contract in the instant case to the firm described in your letter of inquiry. This for the reason that the said general contractor now has a license to engage in the business of general contracting and can, in compliance with the provisions of Section 14, supra, show evidence to the County Board of Education of Talladega County that he has a license before his bid is considered by said Board and the contract awarded to him. Between the time the bids on the project were opened and the present date, no action has been taken on the matter of awarding the contract, and you state that in this interim this general contractor has had his license renewed by the Board. Therefore, it is my opinion that the Board of Education of Talladega County, the awarding authority, may now consider the bid of the general contractor mentioned in your letter of inquiry and award the contract to said firm if it so sees fit, without violating the provisions of the act governing general contractors in so doing.

However, as stated in the opinion to Mr. Pettus, supra, there is no recourse against an awarding authority, here the Board of Education of Talladega County, if it fails to comply with the provisions of said act.

Cf. Opinion to Hon. Ed Pettus, supra, a copy of which is enclosed herewith for your information since the same has not yet appeared in our published reports.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1933

Hon. R. J. GOODE, Commissioner,
Department of Agriculture & Industries,
515 Dexter Avenue,
Montgomery, Alabama.

Public Warehouses — Authority of State Board of Agriculture & Industries and its agents, in the event a warehouse is taken in charge for violation of law and regulations or for operations which tend to jeopardize public interest.

Sole duty of the State Board of Agriculture & Industries and its agents, after taking charge of such warehouse, is to close down the operation of same, and to return property stored therein to bailors or to re-store same in public warehouse operated as is provided by law.

Board's agents have no authority to maintain or defend litigation concerning such warehouse except such as involves rights in property stored therein, or collection of accrued storage charges.

Board's agents have no authority to collect assets of such warehouse except storage charges and fees accrued upon property stored therein.

Board's agents have neither the authority to consider nor to pass upon claims against such warehouse.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Article 34 of the Agricultural Code, as amended by General Acts 1935 pages 20 to 23, inclusive, provides for the regulation of public warehouses in Alabama. Sections 398 through 402 relate to complaints against public warehousemen and provide for the taking charge of a public warehouse under certain conditions. It has become necessary that the Commissioner take charge of a public warehouse in Alabama under powers conferred by these sections. The Commissioner, through his agent, is now in charge of this warehouse and is operating the same. The following questions have arisen, upon which I request your opinion:

"(1) Do the provisions of law relating to the taking control of the operation of a warehouse make of the Commissioner when and while acting in such capacity a statutory receiver?

"(2) If it is your opinion that the Commissioner when so acting is a statutory receiver does he have the usual and customary powers

of a statutory receiver, such as those possessed by the State Superintendent of Banks in liquidating a closed bank?

"(3) While operating a warehouse under the provisions of said law is it the Commissioner's duty and has he the power to collect any claims which may be due to the warehouse as a result of the operation of said warehouse either before the taking charge of said warehouse by the Commissioner or during the period of operation by the Commissioner?

"(4) Has the Commissioner the authority to pay claims against the warehouse out of funds accruing from the operation of the same to creditors of the warehouse, including claims accruing before and after the taking over of the operation by the Commissioner?

"(5) Is it the duty of the Commissioner and has he the power to collect fire insurance for losses due to a fire which occurred prior to the time of taking over the operations by the Commissioner? If so, has he the authority to sue in the courts for said insurance and in whose name should said suit or suits be brought?

"(6) Is it the duty of the Commissioner to intervene in any suits pending against the warehouse, which suits involve the public interest? If so, would it be the duty of the Attorney General to prosecute such intervention by the Commissioner or would it be necessary for the Commissioner to employ other counsel to act as attorney for him in his specific capacity as operator of the warehouse?

"(7) It is claimed by some of the insurers that the fire was of doubtful origin and that some of the companies are not liable. Suit has been filed by some of the insurers in the United States District Court in Chancery, with other insurance companies, and the warehouseman being made respondents, seeking to determine the parties liable for insurance, the degree of liability, all liability being denied and other relief. Does the Commissioner have the authority to intervene in this suit and represent the interest of those owning cotton stored in the warehouse?

"(8) Is it necessary that the Commissioner proceed to the closing of the operations of the warehouse as soon as possible and within a reasonable time after taking charge of the same, or may he continue the operations within his discretion so long as he believes it to be to the best public interest and regardless of the wishes of the owner of the physical properties used for said warehouse business?

"(9) Before closing the operation of said warehouse by the Commissioner, is it the duty of the Commissioner to collect all outstanding claims due to the warehouse and to pay all claims against the warehouse?

"(10) To whom should any surplus after the payment of the expenses of operation by the Commissioner be paid?

"(11) Has the Commissioner the authority to arrange for the operation of the warehouse by a suitable individual or company acting upon its behalf and not as an agent of the Commissioner, provided said individual or company arranges with the owner of the physical properties for the use of same?

"(12) If the Commissioner has authority to arrange with an individual or company as set out in the next preceding question, can the Commissioner require such individual or company to collect claims due the warehouse prior to operation by the Commissioner or during the same and to disburse said funds for claims against the warehouse accruing prior to said arrangement?

"(13) In case cotton is stored in the warehouse upon which storage was due at the time the Commissioner took charge of the warehouse and the cotton had remained in the warehouse since that time, can the Commissioner collect the storage charges for the total period both prior to and after the taking charge by the Commissioner? Can the owner of the physical properties and operator of the warehouse prior to the Commissioner's taking charge collect from the owner of the cotton the charges due for storage accruing on cotton prior to the taking charge by the Commissioner? Can he require the Commissioner to pay over to him such amounts collected by the Commissioner either before the payment of the expenses of operation by the Commissioner or after the payment of said expense?

"(14) If the Commissioner has the duty of collecting and disbursing of funds, both before and after taking charge of the warehouse, has he the authority to arrange with the successor in operation of the warehouse to collect and disburse said funds?"

Inasmuch as it is my opinion that the Commissioner of Agriculture & Industries has very limited powers in the administration of the affairs of a warehouse taken over by the State Board of Agriculture & Industries, I shall not undertake to answer each of your questions separately, but shall dispose of all of them by general discussion.

Sections 388-407 of the Agricultural Code of 1927, as amended by Acts of 1935, p. 12, Sections 17-23, are the pertinent provisions of the statutes governing public warehouses operated within this state. Section 401, as amended, provides:

"Section 21. That Section 401 of the 'Agricultural Code of Alabama,' of 1927, be and the same is hereby amended so as to read as follows: Section 401. WHEN STATE BOARD OF AGRICULTURE MAY TAKE CHARGE. — The State Board of Agriculture shall have the authority, in the event it finds it necessary upon such investigation for the purpose of protecting the public interest, to revoke the permit to operate said public warehouse in any case where a permit has been issued, to take charge of the operation and to provide for the operation of said warehouse, whether operating with or without permit, for such time as may be necessary to protect the public interest, and to operate said warehouse under the control of the Commissioner, and require him to make provision, so far as practical, to in every way protect the public interest. It shall be the duty of the State Board of Agriculture if upon such investigation it is ascertained that such a shortage exists in the articles or goods stored in such warehouse as will jeopardize the interest of the public and those who are patronizing said public warehouse, or if it finds existing any other condition relating to such business as will jeopardize the interest of the public, to take charge of the same and operate, or provide for the operation and conduct of said warehouse, or shall make such disposi-

tion of the goods or articles stored therein as necessary to properly protect the public interest, and in any case wherein a permit has been issued to revoke the permit to operate said warehouse."

This is the only provision of law which undertakes to clothe the Commissioner of Agriculture and Industries with authority to administer the affairs of a public warehouse which has violated the provisions of law relative thereto, or which is operating in such manner as tends to jeopardize the interests of the public.

The authority and power of the Commissioner in such cases must be strictly limited to that specifically granted therein, or arising therefrom by necessary implication. This statute is in no wise comparable to the provisions of law relative to the liquidation of State Banks in Courts of Equity having jurisdiction thereof, under the direction of the Superintendent of Banks. There are no provisions for the collection of the assets of the public warehouse, the operations of which are taken over by the State Board of Agriculture and Industries. There are no provisions for the filing of claims against such a warehouse and the allowance thereof by the Commissioner. The State Board of Agriculture and Industries or by any other agency. There are no provisions for the notification of creditors and bailors who may have claims for money or property on account of the operations of said warehouse, and no agency or tribunal is provided for the ascertainment of the correctness of said claims and demands.

In the event the public warehouse is operating under conditions which will warrant the State Board of Agriculture and Industries in taking over the same, under Section 401 of the Agricultural Code, 1927, as amended, it is my opinion that the sole duty of the agents of the State Board of Agriculture and Industries or of the Commissioner, in such cases, is to take charge of the warehouse for the purpose of operating the same such a reasonable time as may be necessary in effecting the return to the several bailors of the property stored therein, or of providing for the transfer of the same to a public warehouse which is operated in compliance with the law.

The Commissioner has no right to maintain suits for and on behalf of the warehouse nor to defend suits against the same except and unless it involves the rights to properties stored therein in the regular course of business or the collection of accrued storage charges. The Commissioner has no right to intervene in suits involving the rights of the warehouse company, or its bailors to the proceeds of insurance policies arising from the loss or destruction of the said warehouse and the property bailed therein by fire or any other cause.

As to storage fees, accrued upon property stored therein, the agents of the State Board of Agriculture & Industries may collect the same upon the redelivery of the property to the bailors or the release of the same to another warehouse. But there is no authority in the Board nor in any of its agents, to disburse said funds except for the actual expenses necessarily incurred in the exercise of its limited power of closing down the operations of the said warehouse.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 24, 1938

Dr. J. N. Baker, M. D.,
State Health Officer,
Montgomery, Alabama.

Court of County Commissioners — Limestone County.

1. An election to levy a special tax pursuant to General Acts 1936-37, p. 238, is to be held at the time when the same is called by the county governing body and notice of said election is to be given pursuant to Section 447, Code of Alabama, 1923.

2. The ballot to be used in said special election is to be worded by the county governing body of Limestone County.

3. The tax, if voted upon favorably, is to be collected at any time during the fiscal year after assessments for state taxation have been made and approved.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of recent date wherein you request my opinion as follows:

"Constitutional amendment submitted to the qualified electors of Alabama on the first Tuesday in May, 1938, as provided by Act No. 201, page 234, General and Local Acts, Extra Session 1936-1937, was adopted.

"Now, in anticipation of a vote by the electors of Limestone County, certain questions arise, answers to which are desired:

1. How shall notice of the election be given?
2. Who is to word the ballot?
3. What shall the wording be?
4. If the vote is favorable, when may the tax be collected?"

Section 1 of Act 201 (General Acts 1936-37, p. 234) provides in part as follows:

" * * * provided such tax is authorized by a majority of the qualified electors of said county voting upon such proposition at an election called and held for the purpose of authorizing such tax. Such an election may be called at any time by the governing body of said county and shall be held and conducted and the results canvassed as now provided by law for holding and conducting and canvassing the returns of an election."

1. It is my opinion that notice of this election shall be given pursuant to Section 447, Code of Alabama, 1923. That is, that the governing body of Limestone County shall call the election for certain specified date and notice shall be given by the sheriff pursuant to Section 447.

2-3. The ballot is to be worded pursuant to the instructions contained in the above quoted section, that is, the county governing body of Limestone County should word the ballot and have the same prepared and the wording

should generally follow that set forth in the Constitutional amendment as set forth in Section 3 of Act No. 201, supra.

4. In answer to your fourth inquiry, allow me to call to your attention the fact that the proposed constitutional amendment provides that the governing body of Limestone County is to levy and collect in addition to all other taxes this one-mill tax which is based upon the valuation as assessed for state taxation.

It is my opinion therefore, that the county governing body of Limestone County, should the vote to levy the said tax be favorable, may levy the tax at any time during the fiscal year after the assessments have been made by the tax assessor and have become final since the one-mill tax is based upon valuation of property as assessed for state taxation. The tax is to be collected by the tax collector at the same time and in the same manner as other state and county taxes.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 27, 1938

Hon. Ed Pettus, Secretary-Treasurer,
State Licensing Board of General Contractors,
223-225 Bell Building,
Montgomery, Ala.

Contractors —

(1) A general contractor who performs work exclusively on Federal property in erecting an "armory, arsenal, fort, fortification, navy yard, custom house, light house, post-office, or public building" is not required to qualify with the State Licensing Board for General Contractors.

(2) Whether a general contractor, who performs work exclusively on Federal property for any purpose other than enumerated above, must qualify with said Board depends upon what jurisdiction the State of Alabama has ceded to the Federal Government over the land in question.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of July 9, 1938, which is as follows:

"I have been requested by the Board through a formal resolution to ask your opinion on the following question.

"Does a private general contractor and by private we mean person, firm or corporation, who performs work for the United States Government on property owned by the United States Government have to comply with Senate Bill 112 passed by the 1935 Legislature known as State Licensing Board for General Contractors or is such person, firm or corporation exempted under Section 13 of the Act or otherwise?"

Section 1 of Act 297, S. 112, Gen. Acts 1935, p. 721, to which you refer, is as follows:

"Section 1. For the purpose of this Act a 'general contractor' is defined to be one who, for a fixed price commission, fee or wage, undertakes to construct or superintend the construction of any building, highway, sewer, grading, or any improvement or structure where the cost of the undertaking is ten thousand dollars or more, and any one who shall engage in the construction or superintending the construction of any structure or any undertaking or improvements above mentioned, **in the State of Alabama**, costing ten thousand dollars or more, shall be deemed and held to have engaged in the business of general contracting in the State of Alabama." (Italics supplied).

To facilitate an answer to your letter, I will divide your inquiry into two parts:

(1) Is a private contractor, who performs work for the U. S. Government on property acquired for one of the purposes enumerated in Section 1505, Code of Alabama, 1923, subject to a state contractor's license?

(2) Is a private contractor, who performs work for the U. S. Government on property acquired other than in accordance with said Section 1505 subject to said license?

In this restatement, the first inquiry should be answered in the negative, if the business is conducted and the work performed entirely on property of the Federal Government because the Federal Government has exclusive jurisdiction over such territory except for the service of process. Therefore, the territory is not "in the State of Alabama" as contemplated in Act 297, *supra*.

Sections 1505 and 1506, Code of Alabama, 1923, provide as follows:

"Section 1505. **CESSION OF CERTAIN LANDS TO UNITED STATES.** — The State of Alabama has ceded to the United States of America jurisdiction over all lands which have been or may hereafter be purchased or otherwise acquired by the said United States in the state of Alabama, for the purpose of erecting thereon any **armory, arsenal, fort, fortification, navy yard, custom house, light house, post-office, or public building of any kind whatever**, and the legislature of the State of Alabama has consented to all such purchases or acquisitions by said United States of America." (Italics supplied).

"Section 1506. **DURATIONS OF JURISDICTION.** — The jurisdiction ceded shall continue during the term the United States of America shall remain owner of the land so purchased, and shall be exclusive for all purposes except that the service of process issued out of the courts of the State of Alabama, shall not be prevented therein."

These sections were enacted to provide a field of operation in Alabama for Article 1, Section 8, Paragraph 17, Constitution of the United States, which is as follows:

"The Congress shall have power: — To exercise **exclusive legislation** in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise **like authority over all places purchased by the consent of the legislature of the state** in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." (*Italics supplied*).

From the above, it is apparent that when the Federal Government acquires land in Alabama for one of the purposes enumerated in Section 1505, *supra*, and Paragraph 17, *supra*, it acquires, *ipso facto*, "exclusive legislation" thereover. **Webb v. White Engineering Company**, 204 Ala. 429, 85 So. 729. The service of process is specifically reserved by Sec. 1506, Code of 1923, *supra*.

In speaking of "exclusive legislation" as used in Article 1, Section 8, Paragraph 17, Mr. Justice Van Devanter stated in *Surplus Trading Co. v. Cook*, 281 U. S. 652; 74 Law Ed. 1095; 50 S. Ct. 455:

"'Exclusive legislation' is consistent only with exclusive jurisdiction. It can have no other meaning as to the seat of government, and what it means as to that it also means as to forts, magazines, arsenals, dockyards, etc. That no divided jurisdiction respecting the seat of government is intended is not only shown by the terms employed but it is a matter of public history."

The only power the State may reserve in giving such consent is the authority to serve process on the property. **Concessions Co. v. Morris, et al.**, 109 Wash. 46, 186 Pac. 655; **Ft. Leavenworth R. R. Co. v. Lowe**, 114 U. S. 525, 29 Law Ed. 264. This reservation of authority is not considered as interfering in any respect with the supremacy of the United States but is admitted to prevent Federal owned property from becoming an asylum for fugitives from justice.

Therefore, in my opinion, your first question should be answered in the negative if the business is conducted and the work is performed wholly on the property of the Federal Government.

If the contractor's operations extend in any manner whatever beyond the limits of the Federal property and on to lands over which the State has jurisdiction, the contractor thereby becomes amenable to the jurisdiction of the State. A recent Virginia case involved a foreign corporation erecting a post office. In the course of its work, the corporation occupied to the exclusion of the public, an adjacent street with its machinery and necessary work. The Court held that such occupation constitutes "transacting business in the State so as to be subject to a statute providing for a contract license fee." **Ralph Sollitt & Sons Construction Co. v. Commonwealth of Virginia**, 172 S. E. 290, appeal dismissed by U. S. Sup. St. 78 Law. Ed. 1463 (Ad. sheets) 91 A. L. R. 774. The case of **Ohio River Contract Co. v. Gordon**, 244 U. S. 68, 61 L. Ed. 997, 37 S. Ct. 599, involved a similar question. There a foreign corporation was performing work under a contract with the Federal Government on a canal reservation, which is property acquired in accordance with Paragraph 17, *supra*. The contractor built a spur railroad beyond the limits of the reservation to dispose of material excavated. The court held that the construction of the railroad on property subject to the State jurisdiction subjected the contractor to State jurisdiction.

The cession of the Federal Government of jurisdiction over lands acquired for one of the purposes mentioned in Paragraph 17, *supra*, is now governed by Sections 1505 and 1506 rather than Sections 3147 and 3161, Code of Alabama 1923. Sections 1505 and 1506 are a later enactment and supersede the former enactment, because the two are in conflict. — **Middleton v. General Waterworks and Electrical Corp.**, 25 Ala. App. 455, 149 So. 351, Cert. Den. 149 So. 352. For your information, Maxwell Field falls within the purview of the first question.

We come now to the second question which must be answered conditionally. The Federal Government acquires lands for many purposes other than those enumerated in Paragraph 17, *supra*, and when lands are thus acquired the Federal Government does not, *ipso facto*, gain exclusive jurisdiction. It gains only that amount of jurisdiction which is necessary to carry out the purpose for which the land was acquired, free from interference by the State. In **James v. Dravo Contracting Co.**, *supra*, Mr. Chief Justice Hughes stated as follows:

“ * * * it is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. The lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its rights of disposal. Clause 17 governs those cases where the United States acquires lands with the consent of the legislature of the State for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the State to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is consistently with the carrying out of the purpose of the acquisition, determine the extent of the federal jurisdiction.” (Emphasis supplied).

It will be seen from the above that an answer to the second question depends upon the purpose for which the property was acquired, and also whether or not the State has ceded any jurisdiction.

When the Federal Government acquires property for any purpose whatsoever, it must do so by direct authority granted it by the Constitution of the United States. This is an inevitable result when the character of the Constitution is considered. In contra-distinction to our State Constitution, which is a curb on the otherwise plenary powers of the Legislature, the Constitution of the United States is a grant of authority only for the purposes enumerated therein. Therefore, when the Federal Government acquires property for any purpose enumerated in the Federal Constitution it thereby acquires jurisdiction to carry out that purpose, free from interference by the State. This point is well illustrated in the recent case of **Silas Mason, Inc. et al. v. Tax Commission of the State of Washington**, 82 Law Ed 154 (ad. Sheets) where the extent of Federal jurisdiction over lands acquired for the construction of the Grand Coulee Dam was under consideration. The history of that case, in brief, is as follows: In 1902 the Federal Government owned large tracts of land which were comparatively worthless without irrigation but which would be highly productive if irrigated. With a view of making these arid lands available for agriculture, the Congress, in that year, passed an Act for “the construction of irrigation works for the reclamation of arid

lands." (32 Stat. at I. 388, Chapt. 1093; 43 U. S. C. 391). This was enacted under authority granted by Art. 4, Sec. 3, Par. 2 of the Federal Constitution, which is as follows:

"The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be construed as to prejudice any claims of the United States, or of any particular state."

The Grand Coulee is one of the dams constructed under authority of this Act as subsequently amended. In the course of said construction it was necessary for the Federal Government to acquire additional lands which it had the authority to do because said acquisition was incidental to the construction of the Dam. The State of Washington had given no consent whatever to the Federal Government to acquire lands for purposes other than those set out in Paragraph 17, *supra*. Nor had the State ceded any jurisdiction over the lands in question.

It was from a contractor performing work on these lands that the State of Washington attempted to collect an occupation tax. The contractor, Silas Mason, Inc., contending that the State had no jurisdiction over the lands, brought suit to restrain the collection of the tax. In the opinion of the Supreme Court, Mr. Chief Justice Hughes held that the lands in question are subject to the jurisdiction of the State in all matters not in conflict with the purposes for which they were acquired. He further held that, inasmuch as the imposition of the State tax on the contractor is not an interference with those purposes, the contractor is liable for the tax.

We now come to the more specific part of your inquiry, i. e., what class of taxation is provided by Act 297, General Acts 1935, page 721, to which you refer. This Act provides a regulatory measure under the police power rather than a revenue tax. Therefore, unless the Legislature has ceded to the Federal Government police jurisdiction over the particular land in question, a contractor performing work exclusively thereon must comply with the provisions of Act 297, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 28, 1938

Hon. H. E. Kendrick,
Tax Collector, Dallas County,

Tax Assessors —

1. Entitled to Assessor's fee provided by Section 54 of the 1935 Revenue Act on escape assessments caused to be made by an agent of the State Tax Commission.

2. Entitled to commissions on collections made on escape assessments caused to be made by an agent of the State Tax Commission.

Opinion by the Attorney General.

Dear Sir:

I have your letter of August 16, 1938, which follows:

"Mr. R. Lewis McAdory, Assistant to the State Tax Commission, has caused to be made numerous escape assessments on foreign securities in this county. These assessments are made in the name of Mr. John S. Pollard, Tax Assessor of Dallas County. In relation to these assessments, please give me as early as possible your opinion on the following questions:

"1. Is Mr. McAdory entitled to an Assessor's fee on these escape assessments, or should the fee be paid to the elected Tax Assessor of this county?

"2. Is the Tax Assessor of this county entitled to, and should I pay to him, commissions on these collections of escape assessments?

"3. In cases where Mr. McAdory makes two assessments against a taxpayer (for example, one assessment for the back years 1933-37, inclusive, and one assessment for 1938) should there be collected from the taxpayer an assessment fee on each assessment?"

Your questions will be considered in seriatim.

In the beginning, it might be well to state that Section 87 of the 1935 Revenue Act gives to the State Tax Commission the authority to employ such assistants as may be necessary for the performance of the duties which may be required of said Commission and to fix the compensation of such assistants, with the approval of the Governor. I am advised that Mr. R. L. McAdory has been so employed by the State Tax Commission and that his compensation has been fixed by a contract with the State Tax Commission, with the approval of the Governor, and that Mr. McAdory's contract does not call for the payment to him of a fee, commission or allowance out of the moneys collected on escape assessments caused to be made by him, but his compensation is paid by the State of Alabama in accordance with the provisions of Section 87, supra.

In answer to your first question, I refer you to Section 54 of the 1935 Revenue Act, which reads in pertinent part as follows:

"The Assessor shall be entitled to a fee for making returns of property which has escaped taxation of fifty cents for each assessment, provided if the escape is for more than one year, all back years shall be made on one assessment blank and the current year's escape on a separate assessment, for which he shall be entitled to an additional fee of fifty cents, such fee to be added to and collected with taxes due."

It is to be noted that the fee here provided for the Tax Assessor is for making return of property which has escaped taxation and not for making a demand on the taxpayer for a list of his property. The duty of making this return is placed on the Tax Assessor by Section 45 of the 1935 Revenue Act, and it matters not that the information leading up to the making of the assessment is furnished by, or the assessment is caused to be made by an agent of the State Tax Commission. The return is nevertheless made by

the Tax Assessor. He performs the duty or service for which the fee is provided by Section 54, *supra*, is allowed. Therefore, it is my opinion that said fee should be paid to the Tax Assessor of the county and not to the agent of the State Tax Commission who furnished the information to, or caused the assessment to be made by the Tax Assessor.

Section 22 of the 1935 Revenue Act reads, in pertinent part, as follows:

"The Tax Assessor shall, during the current term of the present incumbent of said office, be paid commissions as now provided by law."

Then follows a schedule of commissions to be paid to the Tax Assessor after the expiration of the current term of the present incumbent of the office of Tax Assessor. Both this schedule and the schedule provided in Act No. 151, General Acts, 1932, page 170, approved October 27, 1932, which said Act amended Section 3040 of the Code of Alabama of 1923, are based on collections made by the Tax Collector. It is my opinion that the collections made by the Tax Collector on escape assessments caused to be made by an agent of the State Tax Commission should be included in the total amount of collections on which the Tax Collector is entitled to the commissions provided by the above quoted provisions of law.

In the case of **Crow v. Board of School Commissions of Mobile County**, 228 Ala. 107, the Supreme Court of Alabama made the following statement:

"The Tax Assessor, however, is not entitled to commissions on taxes collected on assessments not made by him, but made through the agency of the State Tax Commission, on which commissions are allowed by law to the party who lists and assesses the property."

At first blush, this statement might seem to be opposed to the holding next hereinabove announced. However, a careful consideration of the questions involved shows that there is no conflict between this holding of the Supreme Court and the holding here made. An examination of the record in said case discloses that the taxes collected which occasioned the statement of the Supreme Court above quoted were taxes collected on assessments made by the Deputy Tax Assessor provided for by Section 25-A at page 293 of Act No. 290, General Acts, 1923, page 284, approved September 13, 1923. In that case, the Deputy Tax Assessor had the same power and authority in the making of escape assessments that the Tax Assessor had, and the law providing for his appointment provided the commissions which were allowed to him for making the assessment. In the matter of assessments made by him, the Tax Assessor was not required to perform any duty or render any service and did not perform any duty or render any service. That, no doubt, is the reason for the holding of the Supreme Court that in such a case he was not entitled to commissions on such collections. However, in the instant case the assessment is made by the Tax Assessor just as he makes other escape assessments, and the agent of the State Tax Commission merely furnishes the information to him, or causes the assessment to be made by him. Since the Tax Assessor performs the service of making the assessment, it is my opinion that he is entitled to have the collections made on such assessments included in the collections on which he is paid the commissions provided by law. This holding is supported by the following statement from **Crow v. Board of School Commissioners of Mobile County**, *supra*:

"When said sections of the code (Sections 3040, 3048 (the latter section being the section providing for the commissions of Tax Col-

lectors) are interpreted in the light of related sections governing the assessment and collection of taxes, the legislative intent is clear that the commissions are allowed for services rendered, and the commissions are to be computed on the taxes — the money collected."

In answer to your third question, I refer you to the part of Section 54 of the 1935 Revenue Act set out in my answer to your first question. You will see that provision is there made for two assessments in such a case and two fees of fifty cents each.

The 1923 Act, *supra*, providing for the appointment of a Deputy Tax Assessor was amended by Act No. 259, General Acts, 1931, page 295, approved June 10, 1931, and the amendatory Act was repealed by Section 49 of the 1935 Revenue Act. Therefore, the instant situation is not to be confused with the situation where the assessments were made by a Deputy Tax Assessor, and the opinion to Hon. C. D. Wadsworth, Tax Collector, Autauga County, Prattville, Alabama, dealing with the fees of a Deputy Tax Assessor is not applicable.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 29, 1938

Dr. A. F. Harman, President,
Alabama College,
Montevallo, Alabama.

Colleges and Universities — Obligations issued by educational institutions of the State of Alabama, including Alabama College, to finance construction of buildings, etc., may be sold to private individuals or private investment brokers, the provision that the State Board of Education and/or the trustees of all such State Institutions may borrow money from Federal Agencies for such purposes not being mandatory. (General Acts 1935, p. 1064).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter in which you request my opinion as follows:

May obligations issued by the educational institutions of the State of Alabama, Alabama College included, to finance construction of buildings, etc., be sold to private individuals or private investment brokers?

In my opinion, the Supreme Court of Alabama in the case of *J. A. Keller v. State Board of Education of the State of Alabama, et als.*, (Supreme Court MS., September 7, 1938) has definitely answered your question in the affirmative. In its opinion in said case, the Court in speaking to the question of the right of bondholders to enforce the obligations in the bonds issued for these purposes by the various educational institutions of the State of Alabama, stated:

"Under the adjudicated cases from this jurisdiction, and others, it appears, and we now declare that the right of mandamus is suf-

ficient protection to purchasers whether such obligations are sold direct to the Federal agencies or to private purchasers." (Emphasis ours).

While we do not deem it necessary to add to this statement of the Supreme Court, believing it to be conclusive of this question, we append hereto the following authorities which strengthen and support the conclusion which we have hereinabove reached.

It has been held heretofore that educational institutions of the State of Alabama are without authority to borrow money other than as specifically or by necessary implication given by statute. — **Alabama College v. Harman**, 234 Ala. 446, 175 So. 394.

However, it has been likewise specifically held that the Act found in General Acts 1935, p. 1064, gives to said educational institutions the authority to borrow money for the purposes set out therein. — **Harman v. Alabama College**, 235 Ala. 148, 177 So. 747; **J. A. Keller v. State Board of Education of the State of Alabama, et als.**, supra.

The only basis for a contention to the contrary is that the said 1935 Act provides that said educational institutions have the authority "to borrow money from Federal Agencies" for the purposes enumerated therein, it being contended that this proviso is a limitation on the source from which such loans may be obtained. However, the main, if not the sole purpose of said 1935 Act, was to give to said educational institutions the power and authority to borrow money for the purposes enumerated therein, and the proviso above quoted relating to the source from which the money might be borrowed is a mere incident thereto. — **Reynolds, Sheriff, et al. v. Fabritis, et al.**, 233 Ala. 625; **Gaston Scott, President, et al. of State Highway Commission, v. Charles W. Lee, as State Comptroller**. (Supreme Court MS., June 30, 1938).

In the **Scott v. Lee** case, supra, the Supreme Court of Alabama had under consideration the question of whether or not the tax on lubricating oils used "in internal combustion engines" belonged to the highway or the general fund of the State. The answer to the question involved an interpretation of the Act found on page 179 of General Acts of Alabama 1936-37, and the Court spoke as follows:

"Said Act, both by title and body, provides for the prevention of the use of the taxes on 'lubricating oil, gasoline, naphtha and other liquid motor fuels used in 'internal combustion engines' for any purpose, less the cost of collection, other than for the 'construction, improvement, maintenance and supervision of highways, bridges and streets, including the retirement of bonds', etc.

"The statute is plain in mentioning the articles upon which the tax is collected, including 'lubricating oil', and there is a general repealing clause of all laws in conflict, general, local or private. True, the Act uses the words, as is provided for in Schedule 156.1 of House Bill 324 (The General Revenue Bill, 1935, Acts 1935, page 509). This reference is inapt and almost meaningless, and cannot be construed as restraining or confining the present act to gasoline only in the fact of the special mention of lubricating oil and other articles and the citation can well be disregarded. — **Reynolds, Sheriff, et al. v. Fabritis, et al.**, 233 Ala. 625."

The Supreme Court of Kentucky had before it in the recent case of *J. D. Van Hooser & Co. v. University of Kentucky*, 262 Ky. 581, 587, 90 S. W. (2d) 1029, a 1934 statute of the State of Kentucky authorizing the State Teachers' College and other state educational institutions of Kentucky to acquire buildings to be used in connection with such institutions and to issue bonds therefor payable from the revenues of such buildings. Section 2 of said Act is almost identical with Section 1 of the Alabama Enabling Act of 1935, *supra*, and provides in part as follows:

"For the purpose of defraying the cost of acquiring such buildings and appurtenances thereto by construction, any such state educational institution may borrow money from the **Public Works Administration or other agency of the Federal Government** and issue negotiable bonds, provided no such bonds shall be issued unless and until authorized by a resolution specifying the proposed undertaking, the amount of bonds to be issued and the maximum rate of interest such bonds are to bear, which shall not be more than six per cent (6%) per annum. * * * " (Emphasis ours).

J. D. Van Hooser & Co. bid in the bonds issued by the institutions under the authority of said Act, but entertaining a doubt as to their validity proceeded under the Kentucky declaratory judgment Act to procure a judicial determination of the several questions regarding the legality of the issuance of said bonds, among them being the right or power of the University of Kentucky to sell the bonds to a private individual.

Speaking to this question the Kentucky Court stated:

"We also conclude that the circuit court correctly held that the bonds could be sold to a private individual. Section 2 of the Act of 1934 provides that a state educational institution may borrow money from the Public Works Administration, or other agency of the federal government, for the purposes enumerated in the act, but it was not the intention of the Legislature, by this provision, to prohibit the governing body of the institution from obtaining the money from some other source. The act itself contemplates that the bonds will be sold by the federal government to private individuals, and section 4 of the act provides that 'such bonds shall be sold in such manner and upon such terms as the board of trustees, board of regents or governing body of such state educational institution shall deem for the best interest of such institution.' The primary purpose of the act is to enable state educational institutions to erect buildings and to pay for them with bonds payable out of the revenues derived from the buildings. Viewing the act as a whole, it was clearly the intention of the Legislature to enable the governing bodies of such institutions to finance the construction of necessary buildings upon the best terms possible and at the lowest rate of interest obtainable. The provision in Section 2, relating to the borrowing of money from the Public Works Administration, is not mandatory."

Therefore, on the basis of the authorities hereinabove cited and quoted from, we advise you that the obligations issued by the educational institutions of Alabama, including Alabama College, under the authority of the 1935 Act, *supra*, to finance the construction of buildings, etc., may be disposed of to private individuals or private investment brokers.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 30, 1938

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Sheriffs — Entitled to fee provided by Section 7287, Code of Alabama, 1923, not to exceed \$90.00 annually, upon showing to the Court of County Commissioners that he has discharged his duties in relation to the public roads.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of recent date, which reads as follows:

"A Sheriff of a certain County in the State has presented to the Commissioners Court a claim that reads as follows:

"Discharging my duties in relation to the public roads, reporting and condemning bridges in different parts of the County, reporting gullies, washouts, mud holes and keeping order at ball games, box suppers and other school and church entertainments for the year 1937 _____ \$90.00."

"Please refer to your opinion of November 15, 1933, to Hon. W. H. Gillespie, Sheriff of Chilton County, Biennial Report 1932-1934 page 427 and Section 7287 Vol. III, Code of 1923, page 602 and advise me as follows:

"1. Are the services referred to in this claim duties of the Sheriff in relation to public roads? If such services are duties in relation to Public Roads will the claim for \$90.00, upon the approval of the Commissioners Court, be a legal expenditure of county money?"

The part of Section 7287 of the Code of Alabama, 1923, pertinent to your inquiry reads as follows:

"Sheriffs are entitled to receive the following fee for the following services: * * * Discharging his duties in relation to public roads, he is entitled to receive annually, on showing to the court of county commissioners that he has discharged his duties, to be paid out of the county treasury, not exceeding \$90.00."

This provision has been a part of the statutory law of this state, in substantially the same form as it now appears, since December 23, 1936. It first appeared as Section 10 of Act No. 13, General Acts, 1836, page 11, approved December 23, 1836, and provided for the payment to the sheriff, for these services, of the flat sum of \$90 annually, upon his showing to the Court of County Commissioners that he had performed such services. It was carried in this form in Aiken's Supplement of 1841 at page 315, and Clay's Digest, 1843, on page 509, as Section 1186 of the Code of 1852 and Section 1374 of the Code of 1867. In all of these publications of our statutory law it appeared as part of the article or chapter on public roads, bridges, ferries, etc. By Act No. 71, General Acts, 1876-77, page 93, approved December 2, 1876, the flat sum of \$90.00 was changed to the sum of not exceeding \$90. That is the form in which it now appears in the code, and it appeared in this form as Section 5032 of the Code of 1876, Section 3687 of the Code of 1886, Section

1377 of the Code of 1896, and Section 3722 of the Code of 1907. In the last five codes it has appeared as a part of the article or chapter on costs and fees of officers.

It has never been repealed since it was first enacted in 1836, and the only change, which is noted above, was made in 1876.

It is true that Section 7255 of the Code of Alabama, 1923, provides:

"The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

However, Section 7276 of Article 7 of Chapter 275 of the Code of Alabama, 1923, which is the chapter on costs and fees of officers, also provides:

"Clerks, sheriffs, and other officers in this chapter named are entitled to receive, for the services therein mentioned, the fees to such services respectively annexed; and no more, to be taxed, paid, and collected in the manner directed by the provisions of this code."

Section 7287, *supra*, is a part of the same article and chapter.

Speaking to the general question of the authority of an administrative board or agency, the creature of legislation, to expend public funds, Mr. Justice Bouldin, for the Supreme Court in the case of *Woodruff v. Beeland*, 127 So. 135, said:

"An administrative board or other agency, the creature of legislation, has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a 'thus saith the law' for every disbursement.

"Unless a given charge on such fund is expressly or impliedly authorized, it cannot be lawfully incurred."

The administrative board dealt with in that case was a county board of education.

We believe that the converse of his statement is equally true and that when an administrative board or other agency, the creature of legislation, (here a Court of County Commissioners) can point to a "thus saith the law," for a disbursement, that it has the authority to make such disbursement, and that when a given charge on a fund is expressly or impliedly authorized, it can be lawfully incurred.

County governing bodies have the general superintendence of the public roads, bridges and ferries within their respective counties, and to that end have legislative, judicial and executive power, having unlimited jurisdiction and powers in such matters, except as their jurisdiction and powers may be limited by local or special special statutes. This has been so since the passage of an Act of the Legislature of 1915 on September 22, 1915, appearing on page 573 of the General Acts of 1915. Section 1 of said Act, giving such powers to county governing bodies, appears as Section 1347 of the Code of Alabama, 1923, and was re-enacted without substantial change in the 1927 Highway Code and appears as Section 1397 (110) of Michie's Code of Alabama, 1928. Therefore, a county governing body, pursuant to this authority, may

order the sheriff of the county to perform certain duties in regard to public roads and bridges. And the sheriff must obey such orders, for Section 10189 of the Code of 1923 reads in pertinent part:

"It is the duty of the sheriff * * * (2) To attend upon * * * the Court of County Commissioners, when required by the judge of probate, and to obey the lawful orders and directions of such courts."

If a county governing body orders the sheriff to perform certain duties in relation to the public roads, and Section 1397 (110), supra, gives it authority to do so, and he shows to their satisfaction that he has performed these duties, which he must perform (Section 10189, supra), it is my opinion that the above quoted provisions of Section 7287 of the Code of Alabama of 1923 are authority for the county governing body to pay the sheriff from county funds an amount for this service or these services not exceeding \$90.00. The amount that he shall be paid, up to the \$90.00 limit, and the question of whether or not he has performed his duties in relation to the public roads are questions that address themselves to the discretion of the county governing body.

The premises considered, it is my opinion that in the instant case, if the county governing body has placed upon the sheriff the duty of reporting and condemning bridges in different parts of the county, reporting gullies, wash-outs and mudholes, and is satisfied that he has performed these duties, and that he should be paid \$90.00 for these services, then such an expenditure of county funds is authorized by the above quoted provisions of Section 7287 of the code of Alabama of 1923. Of course, any duty that the sheriff might have performed in relation to keeping order at ball games, box suppers and other school and church entertainments are not, and could not possibly be, duties in relation to the public roads. These are duties required of him as a conservator of the peace of the county.

The opinion of this office to Hon. W. H. Gillespie, Sheriff of Chilton County, under date of November 15, 1933, Biennial Report of Attorney General, 1932-1934, page 427, is hereby modified to conform to the holding of this opinion. The very fact that the provisions of our statutory law providing a fee to the sheriff for the performance of his duties in relation to public roads, upon his showing to the Commissioners Court that he has performed such duties, has not been repealed militates against the statement made in said opinion that the sheriff no longer has any duties in connection with the public roads.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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